(16,267.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 161.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

McCANN & SMIZER, A COPARTNERSHIP COMPOSED OF WILLIAM C. McCANN AND MILTON B. SMIZER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print.
Citation	1	1
Acknowledgment of service of citation	1½	1
Writ of error	2	1
Return on writ of error	2½	2
Assignment of errors	3	2
Caption	4	3
Certified copy of judgment of circuit court of Monroe county	4	3
Order filing motion for new trial	5	4
Order denying new trial and granting appeal	5	4
Order filing bill of exceptions	6	5
Certificate of clerk of circuit court of Monroe county	6	5
Abstract of record for appellants	6	5
Statement	6	5

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 9, 1897.

	Original.	Print.
Petition	7	5
Answer	11	8
Reply	13	10
Judgment	14	10
Bill of exceptions	15	11
Plaintiffs' statement	15	11
Testimony of M. B. Smizer	16	12
Contract	34	25
Testimony of Edward Brown	41	30
Admissions as to facts	50	37
Testimony of Edwin Brown (recalled)	51	37
Demurrer to evidence offered	51	38
Testimony of M. B. Smizer (recalled)	52	39
Testimony of —— Tully	52	39
Ruling on demurrer to evidence	54	41
Testimony of —— Fleming	54	41
George Henwood	59	45
James Fleming (recalled)	59	45
George Henwood (resumed)	60	45
David Dunn	68	52
Defendants' requests for instructions	73	56
Instructions given	74	57
Motion for new trial	77	59
Judge's certificate to bill of exceptions	79	61
Notice of motion to dismiss appeal	79	61
Motion to dismiss appeal	80	61
Order dismissing appeal	80	62
Order filing affidavits, &c	81	62
Affidavit of Geo. P. B. Jackson	81	62
J. H. Rodes	83	64
C. C. Jackson	85	65
Geo. P. B. Jackson	86	66
Order setting aside dismissal of appeal, &c	87	67
Motion to reinstate cause	88	67
Order submitting cause	88	68
Judgment	89	68
Opinion	89	68
Order filing motion for rehearing	94	72
Motion for rehearing	94	72
Reasons for rehearing	96	73
Order denying motion for rehearing	104	79
Order reviving cause	104	79
Order setting aside order denying rehearing	105	79
Stipulation to revive cause, &c	105	79
Order granting motion for rehearing	107	81
Order submitting cause	107	81
Order transferring cause to court in banc	107	81
Order submitting cause	107	81
Judgment of court in banc	108	81
Opinion of court in banc	108	82
Order filing motion for rehearing	115	87
Motion for rehearing	115	87

	Original.	Print.
Order overruling motion for rehearing	118	89
Order filing motion to vacate order overruling motion for rehearing.	118	89
Motion to set aside order overruling motion for rehearing	118	89
Order denying motion to set aside order overruling motion for rehearing	121	91
Order allowing writ of error, &c	122	91
Bond on writ of error	122	91
Order filing assignment of errors	123	92
Assignment of errors	123	93
Clerk's certificate	124	93

1 THE UNITED STATES OF AMERICA:

To McCann and Smizer, a partnership composed of William C. McCann and Milton B. Smizer, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the central division of the western district of Missouri, wherein The Missouri, Kansas and Texas Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Theodore Brace, chief justice of the supreme court of Missouri, this 31st day of March, in the year of our Lord one thousand eight hundred and ninety-six.

THEO. BRACE,
Chief Justice.

1½ [Endorsed:] United States circuit court, western district of Missouri, central division. McCann and Smizer *vs.* Missouri, Kansas and Texas Railway Co. Citation. Filed March 31st, 1896. Jno. R. Green, clerk. Rec'd 4, 8. M.

UNITED STATES OF AMERICA, } *ss:*
Central Division of the Western District of Missouri, }

I hereby acknowledge due service of the within citation this 3rd day of April, A. D. 1896.

J. H. RODES,
Attorney for Defendant in Error.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1895, thereof, between McCann and Smizer, a copartnership composed of William C. McCann and Milton B. Smizer, respondents, and The Missouri, Kansas and Texas Railway Company, appellant, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have

the same at Washington, D. C., not exceeding thirty days from the date of the citation in this cause, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 28th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

{ Seal of the United States Circuit Court, Western District of Missouri, Central Division. }

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by—
THEO. BRACE,
Chief Justice.

2½ [Endorsed:] No. 6391. United States circuit court, western district of Missouri, central division. McCann and Smizer *vs.* Missouri, Kansas & Texas R'y Co. Writ of error to the supreme court of the State of Missouri. Returned and filed 31st day of March, 1896. Jno. R. Green, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Western District of Missouri,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 16th day of April, A. D. 1896.

JNO. R. GREEN, *Clerk.*

3 In the Supreme Court of the State of Missouri In Vacation.

McCANN & SMIZER, Defendants in Error,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error.

Assignment of Errors.

Now comes the above-named defendant (plaintiff in error) and, for its assignment of errors, says that in the record and proceedings in the above-entitled case there is manifest error in this:

1. The supreme court of the State of Missouri erred in holding and deciding that sec. 944 of the Revised Statutes of the State of Missouri of 1889 is not repugnant to the Constitution of the United States.

2. The said sec. 944 of the Revised Statutes of the State of Missouri of 1889 is repugnant to and in conflict with the Constitution of the United States for the reason that it attempts to and, if enforced according to its terms and purposes, does regulate commerce between the different States; and the supreme court of the State of Missouri erred in holding that under the effect of said statute the plaintiff in error was liable in this case for the negligence of another carrier in the State of Illinois upon a shipment from a point upon the road of the plaintiff in error in the State of Missouri to a point upon another line of railroad in the State of Illinois.

GEO. P. B. JACKSON,
Attorney for the Plaintiff in Error,
Missouri, Kansas & Texas Railway Company.

3½ [Endorsed:] McCann & Smizer *vs.* M., K. & T. R'y Co. Assignment of errors. Filed Apr. 14, 1896. Jno. R. Green, clerk.

4 STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to wit, on the 2nd day of July, 1892, there was filed in the office of the clerk of the supreme court of Missouri a certified copy of the judgment and order granting an appeal in the case of McCann and Smizer against George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway Company, which is in words and figures as follows, to wit:

STATE OF MISSOURI, }
County of Monroe, } *ss:*

Be it remembered that among the records and proceedings of the circuit court within and for Monroe county, Missouri, the following is of record, to wit:

April Term, April 27th, 1892.

MCCANN AND SMIZER, Plaintiffs,
against
GEO. A. EDDY and H. C. CROSS, Receivers Missouri, Kansas and Texas R'y Co., Defendants.

At this day come the parties herein, by their respective attorneys, and, this cause coming on to be heard, both parties announce ready for trial; whereupon a jury is selected to try the issues herein as follows, to wit: Joseph R. Murphy, James L. Worland, Moses Tisue, Joseph Walker, James Gentry, Abner Wilson, William Golleham, C. G. Goetz, I. N. Carman, T. B. Ragland, Chas. W. Cowman, and Walker Nesbit, twelve good and lawful citizens of Monroe county,

who, being sworn as required by law, take seats in the jury-box, and, after hearing the testimony of witnesses and the argument of counsel for each of the parties hereto and after hearing the instructions of the court, retire to their room to consider of their verdict, and, after being out a reasonable length of time, return into open court the following verdict, to wit:

"We, the jury, find for plaintiff and assess *his* damages at $654.12.

JOSEPH F. WALKER, *Foreman.*"

It is therefore ordered and adjudged by the court that plaintiffs have and recover of defendants herein the sum of six hundred and fifty-four and $\frac{12}{100}$ dollars for *his* damages and the sum of — dollars, their costs in this behalf expended, and that execution issue therefor.

Afterwards, on the same day, April 27, 1892, the following proceedings were had, to wit:

McCANN AND SMIZER, Plaintiffs,
against
GEO. A. EDDY and H. C. CROSS, Receivers M., K. & T. R'y Co., Defendants.

At this day come the parties herein, by their respective attorneys, and defendants file their motion for new trial in this cause.

Afterwards on April 28th, 1892, and during April, 1892, term of said court, the following further proceedings were had, to wit:

McCANN AND SMIZER, Plaintiff-,
against
GEO. A. EDDY and H. C. CROSS, Receivers Missouri, Kansas and Texas R'y Co., Defendants.

At this day come the parties herein, by their respective attorneys, and the motion for new trial heretofore filed by defendants in this cause is submitted to the court, and the court, having seem and heard said motion, doth overrule the same; whereupon defendants make application for an appeal in this cause to the supreme court of Missouri and file their affidavit for said appeal, and the court, having considered the same, doth grant an appeal in this cause to the supreme court of Missouri. Defendants also present their bond for appeal; which said bond is by the court approved, and leave is granted defendants to file their bill of exceptions in this cause on or before August first, 1892.

Afterwards, in vacation, after April term, 1892, of said court, the following is of record, to wit:

JUNE 21ST, 1892.

McCANN AND SMIZER, Plaintiffs,
against
6 GEO. A. EDDY and H. C. CROSS, Receivers of Missouri, Kansas and Texas R'y Co., Defendants.

At this day come the defendants herein, by their attorneys, and file their bill of exceptions in this cause; which said bill of exceptions, being duly signed and sealed, is made a part of the record in this cause.

STATE OF MISSOURI, *County of Monroe,* } *ss:*

I, Chas. A. Creigh, clerk of the circuit court within and for said county and State, hereby certify that the within and foregoing is a full, true, and complete copy of the judgment and other proceedings thereafter in the case of McCann and Smizer *vs.* Geo. A. Eddy and H. C. Cross, receivers of Missouri, Kansas and Texas R'y Co., as the same appears of record in my office.

Witness my hand as clerk and the seal of our said court hereto affixed. Done at office, in Paris, Mo., June 24th, 1892.

[SEAL.] CHAS. A. CREIGH, *Clerk.*

And afterwards, to wit, on the 4th day of February, 1893, an abstract of the record in said cause for the appellants was filed; which said abstract is in words and figures as follows, viz:

In the Supreme Court of Mo., April Term, 1893.

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway, Appellants. } No. 6391.

Appeal from Monroe circuit court.

Abstract of the Record for Appellants.

This is an action for damages on account of delay in transportation and delivery of 99 head of fat cattle, shipped by plaintiffs from Stoutsville, Mo., to Union stock yards, Chicago, Ill., over the M., K. & T. and Wabash railways.

On April 4, 1891, the plaintiffs filed the following

7 *Petition.*

In the Circuit Court of Monroe County, Mo., April Term, 1891.

McCANN AND SMIZER, Plaintiffs,
against
GEORGE A. EDDY and H. C. CROSS, Receivers Missouri, Kansas & Texas Railway Co., Defendants.

Plaintiffs say that William C. McCann and Milton B. Smizer were on the 12th day of November, 1890, and still are partners and en-

gaged in buying and shipping live stock and selling the same upon the market and were general dealers and shippers as aforesaid and were and still are doing business in the firm name and style of McCann and Smizer.

That the Missouri, Kansas & Texas Railway Company was at and prior to said date and still is a railroad corporation organized under the laws of the State of Kansas; that at said date defendants, George A. Eddy and H. C. Cross, were and still are receivers of all the property of said Missouri, Kansas & Texas Railway Company and were at said date and still are in possession of said railroad and all the rolling stock thereof, including locomotive engines, cars, and all of said property belonging to said corporation, said Eddy and Cross having been duly appointed by the United States circuit court of the eighth judicial circuit and as such were at said date and still are the duly qualified and acting receivers of the railroad property of said corporation known as the Missouri, Kansas and Texas railroad, which said railroad runs through the county of Monroe, State of Missouri, and as such receivers were and still are engaged in running and operating said railroad and doing a general railroad business, and were engaged in the business of common carriers of passengers, freight, and live stock for hire between the village of Stoutsville, in said county of Monroe, State of Missouri, to the Union stock yards, in the city of Chicago, in the State of Illinois.

8 That on the 12th day of November, 1890, plaintiffs were the owners of ninety-nine head of choice fat steers, which they desired forthwith to ship from the village of Stoutsville, in the said Monroe county, Missouri, to said Union stock yards, in the city of Chicago, in the State of Illinois.

That prior to said last-mentioned date the plaintiffs applied to defendants' depot agent at said village of Stoutsville for six cars to be furnished them in which to transport their said cattle from said village and station of Stoutsville, as aforesaid, to the Union stock yards, in the city of Chicago, State of Illinois; that in pursuance of plaintiffs' request, on the 12th day of November, 1890, said station agent and servant of defendants did so furnish said six cars for the shipment of said cattle, and plaintiffs say that on the said 12th day of November, 1890, they delivered their said ninety-nine head of steers, being fat cattle for the Chicago market, to the defendants' said station agent at Stoutsville, as aforesaid, in ample and sufficient time to have been transported and delivered at said Union stock yards, in said city of Chicago, in the early morning of the 13th day of November, 1890, in ample time for sale upon the Chicago live-stock market on said 13th day of November, 1890; that the defendants' said station agent then and there received said ninety-nine head of fat cattle on said 12th day of November, 1890, with instructions and directions from plaintiffs that said cattle be shipped, without unreasonable delay, to the said Union stock yards, at Chicago, Illinois, to be sold on the morning market on the 13th day of November, 1890.

That after so receiving plaintiffs' ninety-nine head of cattle for the purpose aforesaid the defendant- failed, neglected, and refused

to ship, transport, and deliver the same at the Union stock yards, in the said city of Chicago, without unreasonable delay; but, on the contrary, the said ninety-nine head of fat cattle were permitted to remain on the road and in transit from said Stoutsville station to said Union stock yards, in the city of Chicago, for an unreasonable length of time and were unnecessarily delayed, so that said
9 cattle did not arrive at their said destination at the Union stock yards, in the said city of Chicago, early on the said morning of the 13th day of November, 1890, in time to be sold on the market of that day; but plaintiffs aver that after said cattle arrived at Forty-seventh street, in the said city of Chicago, near said Union stock yards and in a mile and a half thereof, although they had — negligently delayed previous thereto and had not arrived at said point without unnecessary delay, yet thereafter the defendants, acting by and through their agents, servants, and employés, negligently and carelessly caused and permitted said ninety-nine head of fat cattle, as aforesaid, to remain in the cars, standing for the full space and period of three hours at Forty-seventh street, and until it was too late for them to be delivered at said Union stock yards, as aforesaid, in time for the market and to be sold on the 13th day of November, 1890, although plaintiffs say that Milton B. Smizer, of the firm aforesaid, had disembarked from the cars in which their said cattle were being transported and had walked from thence to said Union stock yards aforesaid, where he found buyers awaiting the arrival of their said cattle, who were awaiting to purchase said cattle at the price and sum of five cents per pound, provided said cattle arrived at said Union stock yards in time for market and shipment upon said *said* 13th day of November, 1890, and plaintiffs say that if said cattle had been delivered at said Union stock yards at any reasonable time during the morning of said 13th day of November, 1890, and had been delivered thereat without any negligence or unreasonable delay or detention by said defendants plaintiffs could have sold their said cattle and delivered the same to the purchasers thereof at the price and sum of five cents per pound; yet plaintiffs say that said cattle were not in fact delivered at the Union stock yards, in said city of Chicago, as aforesaid, until the unreasonable hour of 12 o'clock m. on said 13th day of November, being at an hour too late to be sold on the market of that day, by reason of which unusual, unnecessary, and unreasonable delay and negligence and careless acts of defendants' agents, servants, and employés in failing to transport and deliver said six car-loads of fat
10 cattle as hereinbefore averred plaintiffs were unable to sell said cattle on the 13th day of November, 1890, or on the following day or days without sustaining great loss upon the sale thereof, the market having declined, after the morning sales upon the said 13th day of November, thirty-five cents per hundred pounds upon the class of cattle to which plaintiffs' ninety-nine head of cattle belonged, and there were no buyers thereafter on the market for the class of cattle owned and offered for sale by plaintiffs, and said class of cattle had declined in price aforesaid and could not be sold until the following Monday, the 17th day of November,

1890, at which time plaintiffs were compelled to sell and did sell all their said cattle at twenty-five cents per hundred pounds less than they could have been readily sold for on the market of said 13th day of November, 1890, had said cattle arrived at said Union stock yards and been delivered upon the morning of said day.

Plaintiffs say they have paid all charges and demands made of them for the transportation and delivery of said cattle.

Plaintiffs say that by reason of said cattle not being delivered and sold on the 13th day of November aforesaid plaintiffs lost twenty-five cents per hundred pounds on the total weight of said cattle, said total weight being one hundred and fifty-four thousand two hundred and ninety pounds, causing a net loss to plaintiffs of three hundred and eighty dollars upon the sale of said cattle on account of the depreciation in the price thereof as aforesaid, in which sum plaintiffs are injured and have sustained damage and loss.

Plaintiffs further say that on account of being required to hold said cattle, and being unable to sell the same upon the market without great loss until Monday, the 17th day of November, 1890, as aforesaid, they were compelled to pay and did pay a feed bill and required to keep and maintain them at the costs and expense of seventy-four dollars and twelve cents, in which said further sum plaintiffs have sustained damage and loss.

Plaintiffs further say that on account of a shrinkage, shortage, and loss in weight upon said cattle, caused by keeping said
11 cattle in the Chicago Union stock yards awaiting a purchaser therefor, which said necessity for keeping said cattle awaiting a purchaser was occasioned and caused by the unusual and unnecessary delay in the transportation and delivery thereof, as hereinbefore averred, they have been further injured and damaged in the sum of two hundred dollars. Wherefore plaintiffs say they have been damaged and injured and sustained loss on account of defendants' unreasonable delays and negligent acts, as herein more fully set out, and on account of defendants' negligent failures and unreasonable delays in transporting and delivering said cattle in the Union stock yards, in the city of Chicago, in the State of Illinois, after so receiving the same as averred, plaintiffs have been damaged in the total sum of six hundred and fifty-four dollars and twelve cents, for which sum plaintiff- asks judgment and for costs of this suit.

McCANN & SMIZER,
By their att'ys, RODES & RODES.

Summons was duly served on the defendants, who appeared and filed the following

Answer.

Now come the above-named defendants and, for answer to the plaintiffs' petition herein, admit that the plaintiffs are and were partners as alleged, and that the defendants are receivers of the Missouri, Kansas and Texas railway and are operating the same as alleged.

Defendants admit that plaintiffs did on November 12th, 1890, deliver to the agent of defendants at Stoutsville ninety-five head of cattle for shipment over the Missouri, Kansas and Texas railway from Stoutsville to Hannibal, thence over the Wabash railway to the Union stock yards, at Chicago, Illinois.

Further answering, the defendants deny each and every other allegation in plaintiffs' petition contained.

Further answering, defendants state that the plaintiffs and defendants entered into a special contract for the shipment of the aforesaid cattle, in and by which contract it was agreed and stipulated, among other thing, as follows:

12 "First. That he (meaning the plaintiffs) hereby releases the party of the first part (meaning the defendants) from the liability of a common carrier in the transportation of said stock and agrees that such liability shall be only that of a mere forwarder, or private carrier for hire, and also hereby agrees to waive and release, and does hereby release said first party from any and all liability for or on account of any delay in shipping said stock after the delivery thereof to its agent, and from any delay in receiving the same after being tendered to its agent."

"Fourth. That he, the said second party, (meaning the plaintiffs) for the consideration aforesaid, hereby assumes and releases said first party (meaning the defendants) from risk of injury or loss which may be sustained by reason of any delay in the transportation of said stock, caused by any mob, strike, threatened or actual violence to person or property, from any source, failure of machinery or cars, injury to track or yards, storms, floods, escape or robbery of any of said stock, overloading cars, freight of animals, or crowding one upon another, or any and all other causes except the negligence of said first party; said negligence not to be assumed but proved by said party of the second part."

And said contract also contained, among others, the following stipulation and agreement, which is stated in said contract in words and figures following, viz:

"Thirteenth. And it is further stipulated and agreed between the parties hereto that in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees; the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond

13 the line of the Missouri, Kansas and Texas railway, excepting to protect the through rate of freight named herein."

Defendants state that the line of the Missouri, Kansas and Texas railway terminate- at Hannibal, in the State of Missouri, and that said railway does not extend beyond said city of Hannibal in the direction of Chicago, Illinois, and that it was necessary that said cattle shipped by plaintiffs should be forwarded from Hannibal, Mo., over some other railroad in order to reach the Union stock yards, at Chicago, Illinois.

That said cattle were transported over the said Missouri, Kansas and Texas railway from Stoutsville to Hannibal with great promptness and expedition and without any delay on the line of said railway or in its yards; that at Hannibal, Missouri, said cattle were delivered and turned over by defendants as forwarders, under the terms and conditions of said contract, to the Wabash Railroad Company for transportation by it over its railway from Hannibal to the Union stock yards, at Chicago, Illinois.

That whether or not there was any delay in the transportation of said cattle over said Wabash railway these defendants have no knowledge or information thereof sufficient to form a belief, but if there was any such delay on said Wabash railway the defendants are not responsible therefor, and under the said contract for the shipment of said cattle these defendants are not liable for damages, if any, resulting from such delay, if any, on said Wabash railway.

Wherefore, having fully answered, defendants pray to go hence without day, and that they recover their costs in this behalf expended.

JACKSON & MONTGOMERY,
Attorneys for Defendants.

And thereupon the plaintiff- filed the following reply:

Plaintiff-, for reply to defendants' answer filed in this cause, de-
nies that plaintiff- executed said alleged contract set up in
14 defendants' answer, and *defendant* further says that said al-
leged contract, if any, was wholly without consideration and void and contrary to public policy.

The case was tried at the April term, 1892, and a verdict was rendered for plaintiffs, on which the court entered the following

Judgment.

At this day comes the parties herein, by their respective attorneys, and, this cause coming on to be heard, both parties announce ready for trial; whereupon a jury is selected to try the issues herein as follows, to wit: Joseph R. Murphy, James L. Worland, Moses Tisue, Joseph Walker, James Gentry, Abner Wilson, William Golliham, C. G. Gertz, I. N. Carmem, T. B. Rayland, Chas. W. Cowmen, and Walker Nesbit, twelve good and lawful citizens of Monroe county, who, being sworn as required by law, take their seats in the jury-box, and, after hearing the testimony of witnesses and the arguments of counsel for each of the parties hereto and after hearing the instructions of the court, retire to their room to consider their verdict, and, after being out a reasonable length of time, return into open court the following verdict, to wit:

We, the jury, find for plaintiff- and assess *his* damages at $654.12.
JOSEPH F. WALKER, *Foreman.*

It is therefore ordered, considered, and adjudged by the court that plaintiffs have and recover of defendants the said sum of six hundred and fifty-four and $\frac{12}{100}$ dollars for *his* damages and the

sum of — dollars, their costs in this behalf expended, and that execution issue therefor.

Thereupon defendants filed motion for a new trial, which was overruled, and defendants filed affidavit and bond for appeal, and appeal was granted to the supreme court.

The proceedings on the trial were preserved in the following

15 *Bill of Exceptions.*

Be it remembered that, before the Hon. Thos. H. Bacon, judge, and a jury, the following proceedings were had:

Plaintiffs' Statement.

By Mr. RHODES: The shipment, gentlemen, referred to was on the 12th of November, 1890, from Stoutsville, Missouri, to Union stock yards, Chicago, consigned to Brown Bros. & Smith, commission merchants. Mr. Smizer, one of the plaintiffs, accompanied these cattle in transit. The commission merchant, Mr. Brown, of the firm of Brown Bros. & Smith, knew the cattle. They were a special grade of fat cattle, sold only, perhaps, to special buyers, who had special orders for that class of cattle, perhaps shipped to New York or elsewhere. As a precautionary measure, Mr. Smizer informed his consignee of the date of shipment, and who had made arrangements, as is customary between the dealer and the consignee, to have buyers in readiness for a large shipment *for* special cattle, and these cattle were expected to be sold to a special purchaser there, and if they had arrived as they were expected to arrive, on the morning of the 13th of November, they could have been sold. The purchaser, whose name I disremember, had an order from New York for this class of cattle. They had been described to him by Mr. Brown, of this firm, and he waited for them as long as he could to fill his orders. You understand that he had certain orders to fill that day, and, waiting until about noon, he purchased other cattle, as plaintiffs' cattle didn't arrive in the morning—didn't get there until 12 m. He purchased and filled his order with other cattle, inferior cattle, perhaps, but cattle that he was compelled to buy in order to fill his contract with his principals; so on account of that this buyer needed no other cattle and plaintiff had no demand for his cattle at all; couldn't sell them at 25c. below what the cattle of this grade were selling for on the morning of that day. He was compelled, as stated in the petition, to hold his cattle over from this day (which was Thursday), Friday, Saturday, Sunday, until

16 Monday, when he sold them at 25c. below the market price on the day of the 13th, when they ought to have arrived, and their ground for damages is the expense to which the plaintiff was put in keeping his cattle from the time of arrival until Monday and the shortage and loss in weights. You, gentlemen, perhaps understand that better than I do.

To maintain the issues in their behalf plaintiffs called as a witness M. B. SMIZER, who, being duly sworn, testified as follows:

Direct examination by Mr. RHODES:

Q. You are one of the plaintiffs in this suit, are you?
A. Yes, sir.

It is admitted in the pleadings that this is a partnership, McCann & Smizer.

Q. Now, Mr. Smizer, state to the jury if you shipped the cattle mentioned in the petition at or about the time mentioned, November, 1890, and state to the jury what you did with reference to the shipment and any delays that occurred and the whole detailed statement of the case.
A. Well, we shipped the cattle just as we usually do.

Defendants' counsel objects to any oral statement of the terms of shipment, as there is a written contract.
By the COURT: You may inquire of the witness if there was a written contract.

By Mr. JACKSON, counsel for defendants:

Q. Was there a written contract, Mr. Smitzer, under which these cattle were shipped?
A. No special contract.
Q. Was there a written contract signed by you and the agent of the receivers? Whose signature is that placed to that paper (handing witness bill of lading, purporting to be contract referred to)?
A. It is mine, sir.
Q. Whose signature is that?
A. I don't know, sir; I take it that it is the agent's.
Q. Mr. Gauen was the agent at that time?
17 A. I don't know who was the agent. I didn't know him.
Q. That is the paper you signed at the time of this shipment, isn't it? Look at it and see if you are not satisfied that you signed the paper.

(Defendants' counsel here exhibits and hands to the witness a document for identification. Plaintiffs' counsel is permitted to examine the document also.)
The validity of this contract is not questioned in the pleadings.
By Mr. JACKSON: I asked the witness if that wasn't the contract signed by him and the agent at the time of the shipment, and he said it was; therefore I renew my objection to any statement of the terms of the shipment, etc., as they're covered by the written contract.
Objection by the court sustained.
To which ruling of the court the plaintiffs then and there at the time excepted.

By Mr. RHODES:

Q. State when you delivered these cattle to the company.

A. Early on the morning of the 12th.

Q. State whether or not you had previously applied to the company's agent for cars to ship them in.

A. We had applied to them the day before for cars.

Q. State what you said to him with reference to the shipment prior to this time.

Defendants' counsel objects to any evidence in regard to a previous application, their being no complaint that cars were not furnished, which would be a separate cause of action.

Objection by the court sustained, there being no such complaint understood in the pleadings.

To which ruling of the court in sustaining the objection plaintiff then and there at the time excepted.

By Mr. RHODES: We wish to show that it is simply a matter of inducement that they were informed of this shipment, where the stock was to be shipped, and of the necessity of getting it there
18 on time. That was prior to the written contract and doesn't form any of the matter contained in the contract, the object of the shipment, and when the cattle were desired to be landed in Chicago. They undertake to ship without unreasonable delay.

By the COURT: I should feel inclined to admit any representations as to the urgency.

By Mr. JACKSON: I have no objection to that. All that I want is that they don't seek to claim anything against us on a ground that they have set up and of which they have given us no notice.

By the COURT: The witness is cautioned not to undertake to make any complaint of the want of adequate cars. No such petition is in the case and no such complaint is made.

By Mr. RHODES:

Q. State when you applied to the agent, Mr. Smizer, for the cars.

A. Mr. McCamm ordered the cars.

Q. He is your partner?

A. Yes, sir.

Defendants' counsel objects to anything that is not of witness' own knowledge.

Objection by the court sustained.

To which ruling of the court in sustaining the objection plaintiff then and there at the time excepted.

Q. Did you accompany these cattle?

A. I did.

Q. What time did you deliver the cattle to the road there in the village of Stoutsville on the morning of the 12th?

A. Well, I don't know, Mr. Rhodes. I didn't keep any date as to the exact time, but it was early in the morning; I suppose six or seven o'clock; not later than seven o'clock. It was before breakfast.

Q. What were the character of these cattle, Mr. Smizer, with reference to weight and condition?

A. They were an extra drove of cattle; extra quality for this country.

19 Q. What was about the weight of the cattle?

A. They weighed 1,655 after the drift was off of them.

Q. At Chicago?

A. No; here at home; after the percentage of shrinkage was taken off.

Q. What was the percentage of shrinkage taken off?

A. 2 per cent.

Q. That is deducted here, is it?

A. Yes, sir; at this end.

Q. Now, what time did you get loaded?

A. I don't know exactly what time he got loaded, but there were several of us loading. I think we were loaded before ten o'clock—the whole train. There were some other parties shipping at the same time, and we helped each other. I don't know which loaded first. I didn't keep no special dates with reference to the time. I don't know what time it was.

Q. Did you inform the agent of the time you expected these cattle to be on the market?

A. No, sir; we never say anything to the agent about that at all.

Q. Did you know what a reasonable time was?

A. Yes, sir; I knew.

Q. Have you been in the habit of shipping over the road?

A. Yes, sir.

Q. What would be a reasonable time for a shipment to arrive at Chicago, starting at the time you did? What time did the train leave Stoutsville after that?

A. I don t know. I didn't keep any time. It was some time before noon, though.

Q. What would have been a reasonable time?

A. The time they left there they should have been in Chicago the next morning at seven o'clock, anyway. It would have been seven o'clock.

Q. You say you signed this paper?

A. I did.

20 Q. At whose request?

A. The agent's.

Q. Do you know whether one or two were signed?

A. Two. This is marked duplicate.

Q. There was another paper given to you, was there?

A. Yes, sir.

Q. What became of the other paper?

A. I delivered it to them to get my pass back home.

Q. Were you always required to sign a paper of this kind when making a shipment?

A. Only when I accompanied the stock or when an agent accompanied them.

Objected to by defendant- as incompetent and immaterial.

Objection by the court overruled, as witness has already answered the question.

To which ruling of the court defendant- then and there at the time excepted.

Q. Now, in this contract there is a clause as follows: "Brown Bros. and Smith." I will get you to read this part of it if you can.

Document previously mentioned is here handed back to witness and he is requested to read it if he can, a specified part of it, that following the words "head of cattle." Witness announces his inability to decipher the part which proves to be "more or less, owner's risk."

Q. This contract says ninety-five head of cattle. How many did you ship?

A. Ninety-nine.

Q. Here is a clause here, "subject to minimum weights applying to cars of various lengths as per tariff rules in effect on date of shipment, same being a special rate lower than the regular rates." I will ask you if they gave you any special rates.

A. No, sir; no rate lower than the regular rate and the same rate as every one else.

Q. Did you get the same rate given you now under this shipment as you get under a shipment where you signed no papers?

21 A. The same rate.

Q. Whether you signed that contract or whether you did not, the same rate applies?

A. Yes, sir.

Q. Did all parties under your knowledge get the same rate?

A. All that I knew of got a like rate.

Q. The rate said to be 17½ per cwt., was that the prevailing rate then for shipments at that time?

A. As far as I knew it was.

Q. Did they have a tariff sheet in the office?

A. Yes, sir; they had a tariff sheet there.

Q. That conformed to the sheet there?

Objected to as incompetent, irrelevant and immaterial, and because the tariff sheet will speak for itself.

Objection by the court sustained.

To which ruling of the court in sustaining the objection plaintiff- then and there at the time excepted and still excepts.

Q. Mr. Smizer, you may state at what time you did arrive in Chicago with this shipment of stock.

A. It was just twelve o'clock when we got in the yards. The twelve-o'clock whistle was blowing as we went into the yards in Chicago.

Q. State whether or not you found any sale for the cattle, or a purchaser or buyer awaiting you.

A. Mr. Brown had told me that he had a buyer for the cattle. I

walked on into the yards ahead of the train and met the gentleman, and he came to me several times and wanted to know if they had got in.

Defendants' counsel objects to any conversation with Mr. Brown.

Q. State if, when the cattle did arrive there, you found any buyers awaiting you, and at what price.

A. We did not. We found no buyers that day at all for that class of cattle.

22 Q. Did you put the cattle on the market there for sale that day?

A. Yes, sir.

Q. Were you able to sell them?

A. We were not.

Q. What were that class of cattle selling for on the morning of the 13th?

A. They were selling for five cents and the rise.

Q. Were you offered this amount for the cattle any time during the day after they arrived?

A. We were not.

Q. What was the best you could sell them at at any offer?

A. I had no offer, as far as I know.

Q. State whether or not there was any demand for the cattle after they arrived, for this class of cattle.

A. No demand that the commission men could find for this kind of cattle. There was an order that morning for a train of heavy cattle.

Objected to by defendants unless order was received by witness. Any statement of what was told him by others objected to.

Objection by the court sustained.

To which ruling of the court plaintiff then and there at the time excepted and still excepts.

Q. State, Mr. Smizer, how long you were compelled to keep these cattle before you did find a buyer for them.

A. We kept them until the following Monday.

Q. The 17th?

A. Yes, sir.

Q. The 13th was Thursday, and you kept them until the following Monday?

A. Yes, sir.

Q. At what cost to you? I mean, first, the cost for keeping, the feed bill.

A. $74.12 feed bill.

Q. What cost with reference to reduction in the price of cattle? What did you sell the cattle for on Monday?

23 A. The cattle were sold for 4¾ or $4.75 per cwt.

By Mr. JACKSON: Did you stay there until Monday and see them sold yourself?

A. No, sir; I did not.

Defendants' counsel objects on the ground that it is incompetent for him to state what occurred when he was not present.

Objection by the court sustained.

To which ruling of the court in sustaining the objection plaintiff- then and there at the time excepted and still excepts.

Defendants' counsel then moved to strike out all he said in regard to what happened in Chicago after he left there.

Which motion the court sustained.

To which ruling of the court in sustaining the motion the plaintiff- then and there at the time excepted and still excepts.

Q. Did you receive a statement from your commission man of the sale of the cattle?

A. I did.

Q. Have you got it?

A. I have a duplicate of it.

Q. Let me see it, Mr. Smizer.

(Statement handed to counsel by witness.)

Q. How many cattle did you ship, Mr. Smizer?

A. Ninety-nine head.

Q. What was the weight of these cattle at the date of shipment? Have you a memorandum?

A. Yes, sir.

Q. State what it was.

A. 1,655 pounds; 1,688 pounds was the gross weight per head. The gross weight of the whole lot was 167,224 pounds.

Q. You are accustomed to shipping cattle. You are in that business, I believe?

A. Yes, sir.

Q. What would be the ordinary loss in the weight of cattle shipped to sell the following day?

A. Well, the ordinary shrinkage of that class of cattle,
24 fatted like these, would be 34 to 40 pounds per head—that is, after the deduction of the two per cent. for drift.

Q. Now, what was the net weight after deducting two per cent.?

A. The net weight was 163,876 pounds.

Q. That net weight is what you paid for here?

A. Yes, sir.

Q. I understand the net weight to be the gross weight with two per cent. off?

A. Yes, sir; that is right.

Q. Now, you say there ought to have been a further reasonable shortage, a shortage of 35 to 40 pounds per head?

A. Not exceeding 40 pounds for cattle fed like these.

Q. How were these cattle fed?

A. These cattle had been fed twelve months on corn.

Q. What was the shrinkage on these cattle?

A. I don't know as I can say exactly what that was; I think, though, it was 84 pounds, as well as I remember.

Q. Did you receive this paper as a statement of the sales from Chicago from Brown Brothers & Smith?

A. No, sir; that is a duplicate of the bill.
Q. From whom did you obtain it?
A. From Brown Brothers & Smith.
Q. When did you receive it?
A. I don't remember when it was.
Q. Did you make a special request for them to send you a duplicate?
A. No, sir.
Q. Was it about the time of this shipment or very recently?
A. Very recently. One day last week; I don't remember the day.

Cross-examination by Mr. JACKSON:

Q. Mr. Smizer, who loaded these cattle into the cars?
A. Myself; and there were several other parties there who helped me and I helped them.
Q. There were some gentlemen shipping cattle at the same time and you helped one another?
A. Yes, sir; we helped one another.
Q. So far as your cattle were concerned, you loaded them in the sense that you superintended it?
A. Yes, sir.
Q. How many cars were there in the train, do you remember, or how many were added at any place at that day?
A. No, sir; I don't remember.
Q. You had six cars?
A. I did.
Q. They were all to go out at the same time?
A. Yes, sir.
Q. And did go at the same time?
A. Yes, sir.
Q. How long were you engaged in loading the train?
A. I don't remember.
Q. It took you some time?
A. Yes, sir; it took some time.
Q. You didn't go out on a regular train?
A. No, sir.
Q. They sent a special train?
A. I suppose so. I don't know whether it was a special train or not; I paid no attention to that.
Q. You didn't leave on the regular schedule time?
A. No, sir.
Q. The engine went up the road and came back a ways and pulled you as a special train to Hannibal?
A. I don't know.
Q. Went up the road a little further and was then sent back after the train to take your stock out and those of the other gentlemen. Do you recollect about that?
A. Yes, sir; they did. They left the train and doubled us up there.

26 Q. With the other train?
A. Yes, sir.
Q. Did you take any other cars at Clapper?
A. They took the cars they pulled up there with a train of cotton; I think it was cotton, as well as I remember.
Q. Pull up there?
A. Pulled up from Stoutsville, and they left the cars up at Clapper and came back.
Q. Mr. Smizer, ain't you mistaken about that?
A. No, sir; I think not.
Q. Isn't it a fact that the engine went up with one single car?
A. No, sir.
Q. And left that car up there and then came back after you?
A. If they did, they got more there. I don't know what it went up with. I didn't see it go up.
Q. You think it took hold of other cars in there?
A. I know it did.
Q. Now, then, you don't remember what time you left Stoutsville?
A. No, sir; I don't.
Q. It was before noon some time?
A. I think it was, as well as I remember. I know we met a passenger train at Monroe City. I think that is where we met them; maybe it was not.
Q. Well, now, then, you went out and loaded your cattle and then you executed these contracts in duplicate, and the agent kept one copy and you took one?
A. Yes, sir.
Q. This paper which you have already identified, which I hold, is the duplicate that the agent kept?
A. I suppose it is, as far as I know.
Q. You used the other one for return transportation?
A. Yes, sir; I used the other for return transportation.
27 Q. Then you went along. After you left Stoutsville how long was it until you got to Hannibal?
A. I didn't keep any record of time at all. I never noticed any time at any place.
Q. You didn't make any stop or lose any time on the way between Stoutsville and Hannibal? You went right along, except to pass trains?
A. Yes, sir; we went right along.
Q. You met a passenger train at Monroe City, you think?
A. Yes, sir.
Q. The trains were on time? They didn't pull up there for any delay or for anything of that sort?
A. I don't know. I don't remember.
Q. You went along and made the run to Hannibal in about an hour and a half?
A. I don't know what it was.
Q. You know it was a rather good run, wasn't it—into Hannibal?
A. I don't remember. I don't remember what time we got into Hannibal.

Q. You went as fast as a passenger train would go?

A. I don't know that we did. I don't remember.

Q. You don't remember any delay, however, on the way?

A. No, sir.

Q. You are sure that there wasn't any delay by lying at stations on the way?

A. We were a little late getting out of Stoutsville; a little delay on account of something at Clapper; I don't know what.

Q. Mr. Smizer, the engine was there waiting for you a long time before you got your cattle loaded, wasn't it?

A. It might have been. The other parties may have loaded first. I don't remember. We could have loaded before we did, but the agent told us not to.

Q. Who told you not to?

A. The agent told us there was a wreck there and we couldn't get out—a wreck, a car off, or something. We were a little
28 later getting out of Stoutsville than we intended.

Q. It didn't delay you any?

A. We didn't load as soon as we could have.

Q. It didn't delay you any after you started?

A. No, sir.

Q. You cars were there all ready for you, but somebody told you not to load. Is that what you said?

A. We didn't load as early as we intended to, but then we loaded. We have left later than that.

Q. Now, you got up there and you made the connection with the Wabash road in Hannibal all right, didn't you?

A. I don't know anything about the connections, the time, or anything about it. I paid no attention to that whatever.

Q. From the time you got to the outer depot?

A. From the time I left here I paid no attention to time or any other road.

Q. You didn't pay any attention to where the delay occurred?

A. No, sir.

Q. From the time you reached the outer depot in Hannibal until you were taken charge of by the Wabash Company and their caboose put on the train and you put under their control half an hour had not elapsed?

A. I don't know. I paid no attention.

Q. Have you no idea—no recollection?

A. None whatever.

Q. You cannot have any recollection, either, about how long it took you to go to Hannibal?

A. No, sir.

Q. Where did you get your dinner that day?

A. I don't know whether I had any or not.

Q. You even forgot your dinner?

A. It very often happens on those trips that I don't have a chance to eat.

Q. Didn't you eat your dinner in Hannibal?

A. No, sir; I don't think we did. I think we had our dinner fixed to take with us; we very often do.

Q. You must have expected to get into Hannibal after dinner time?

A. No, sir; we prefer taking it with us when we can.

29 Q. Have you any idea when you left Hannibal?

A. No, sir.

Q. You don't remember about that?

A. No, sir; I don't remember.

Q. You don't remember what day you left Hannibal?

A. Yes, sir; on the 12th of November.

Q. That you started with these cattle from Stoutsville?

A. I think it was.

Q. And you got to Hannibal and left on the same day?

A. Yes, sir.

Q. You went over the Wabash railway from Hannibal?

A. Yes, sir; I think so.

Q. Don't you know whether you did or not?

A. Yes, sir; we went over what is called the Wabash road.

Q. That is the way you expected to go when you left Stoutsville?

A. Yes, sir.

Q. You preferred the Wabash road at that time, didn't you?

A. I don't know that we had any preference.

Q. It is the one that you selected for that shipment?

A. Yes, sir.

Q. Since that time you have refused to ship over that road?

A. We have been shipping like we always did, over the same road, making the same shipments that we always have been making. We bill our stock out here.

Q. Do you direct them to go over the Wabash or the C., B. & Q.?

A. I don't direct them at all.

Q. Have you gone to Chicago since this shipment over the Wabash road?

A. I went over the same road.

Q. You are sure of that? Didn't you say at the time that you would not ship any more over the Wabash?

A. I don't know what I might have said.

Q. Now, then, where did you suffer the delay that made you late getting into the market?

A. Suffered it all along the line.

Q. All along the line?

A. I don't know. I never paid any attention to any time

30 whatever until we got to Chicago. We run in there at 39th street, I think. I don't know the exact street. It is where the Y is, where they change the engine, and I walked from there to the stock yards.

Q. What time did you get there?

A. I don't know. I had no time and I looked at no time. I think it was about eight o'clock when I got there.

Q. And then you remained there some time?

A. I don't know how long we remained there. I went onto the platform and stayed there until twelve o'clock.

Q. This delay was at 39th street, in Chicago, wasn't it?

A. I don't know where it was at. I left the stock there.

Q. You left there at eight o'clock?

A. As well as I remember—as well as I can place the time.

Q. Wasn't it a little earlier?

A. I don't know what time it was.

Q. But it was at least from eight until twelve o'clock that they occupied in getting from that street to the platform?

A. It might have been eight; it might not have been; it might have been after. I don't carry any timepiece. I just suppose it was. I got off there and left and walked across, which I often do.

Q. And supposed they would come on shortly behind you?

A. Yes, sir. I knew we were later than common.

Q. How much later than common?

A. I don't know how much. I know it was later than common, because they were on the road at the time they ought to have been there.

Q. Did you ride in the caboose?

A. Yes, sir.

Q. Did you sleep that night?

A. I was up most of the night.

Q. Do you remember any place that you laid that night for a while?

A. We were delayed some place. I don't know where it was.

Q. Over in Illinois, waiting for a passenger train to get out of the way?

A. I don't know what they were doing.

Q. They laid there in the yard how long?

A. I don't know, sir.

Q. Have you any idea about it?

31 A. It is pretty hard for a man to keep account of that unless he is thinking about it.

Q. You have had this suit pending pretty much all the time since then?

A. I hav-n't paid any attention to it; hav-n't given it a thought.

Q. Was that Decatur where you laid during the night?

A. I don't remember whether it was Decatur or where it was.

Q. It was at some station over there in Illinois where you laid for how long, about?

A. I have no recollection of it.

Q. Well, it was over an hour, wasn't it, that you laid there?

A. I don't know; it might have been. I very often go out to look after the stock and come back and lay down and go to sleep, and I never know when they go.

Q. Is that the first place you stopped for any length of time, the place that you cannot call the name of, when you stayed there at night for a while?

A. I don't know.

Q. Are you sure you were delayed at all, Mr. Smizer?

A. Where?
Q. Anywhere, any time?
A. We were late into Chicago, I know that.
Q. Well, now, what time had you gotten to this 47th or 39th street?
A. Six o'clock.
Q. What do you speak from, Mr. Smizer, the time-card—that is, the schedule time, the usual time there?
A. I don't know what the schedule time is. I speak from the time that I made the trips.
Q. You are just judging from the number of times you have gone in, not that this is the schedule time?
A. That is what I am judging from.
Q. How many times had you made that trip before that?
A. I don't know how many times.
Q. Had you made that trip before very often, and always got there at six o'clock?
A. Not always; just as often we did not do it.
Q. Do you know whether it was a special train, an extra train of the Wabash, or whether it was a regular train running on schedule time?
A. I don't know.
32 Q. Do you know or not that the schedule time for the arrival of the train at 47th street is after seven o'clock in the morning?
A. I don't know, sir, what it was. I don't know what time I was on.
Q. What time does the cattle market open in Chicago?
A. Usually from nine until ten o'clock. You mean this particular kind of cattle?
Q. Well, take it for this kind of cattle. You said they didn't get there in time for the market; what do you mean by that; when does it begin and end—that is, the kind of market you were talking about?
A. There are very few men there to buy that kind of cattle—that is, these exporters. That day there was only one man that I know of that had an order for them, and he had to fill his order at a certain time.
Q. You don't know what that time was?
A. I know it was before 12 o'clock, and he had promised to wait for the cattle and save a place for them.
Q. Your cattle?
A. Yes, sir.
Q. This buyer that buys them from Brown Bros. & Smith?
A. Yes, sir.
Q. That is what Brown told you?
A. Yes, sir.
Q. Now, these cattle were at 47th or 39th street about eight o'clock?
A. As well as I know the time.
Q. How far is that from the platform—that is, how far from where they had to run?

A. I don't know how far it is. I don't suppose it is over a mile or two; it is a short distance.

Q. So, if the cattle had gone in from this place, this Y, without any delay, they would have been in ample time for the market and could have been in on this order?

A. I suppose they could.

Q. It was, therefore, the delay that occurred at 47th street, the Y, in Chicago, that caused you the damage and loss that you complain of, wasn't it?

A. I suppose it was the delay all along that caused it.

33 Q. Isn't it a fact, Mr. Smizer, that if it had not been for that delay at this point in Chicago, at the Y, that the cattle would have been there in ample time to have gone on the market and on that order that you have spoken of, and that you would have suffered no inconvenience or loss or damage on account of any delay?

A. We could have gone in on time if they had put them in; they held them there and didn't do it.

Q. The failure to get from that point to the platform or the yards is what prevented them from getting in on this order that *that* you spoke of?

A. By not getting there in time is what prevented them from getting into this order.

Redirect examination by Mr. RHODES:

Q. You speak about the Wabash and other roads. You had no contract with the Wabash road?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial.

Objection by the court overruled.

To which ruling of the court defendants then and there at the time excepted and still excepts.

Q. You had no contract then with the Wabash road to ship your cattle?

A. Not that I know of.

Q. The only arrangement was with the M., K. & T.?

Objected to on the ground that the written contract speaks of the arrangement.

Objection by the court overruled.

To which ruling of the court defendant then and there at the time excepted and still excepts.

By the COURT: You have stated, I believe, that on previous occasions, starting at a corresponding time, you had reached Chicago in the neighborhood of six o'clock in the morning—that is, you reached 39th street. Is that correct?

A. Yes, sir.

Q. Can you tell the jury on what time on those previous occasions your stock had been delivered at the market place at the Union stock yards.

A. They very often had been delivered at the stock yards by six o'clock; but I don't remember dates. I could not call the dates.

34 Q. I asked you on former occasions or other occasions when you arrived at 39th street about six o'clock in the morning at what time your stock had arrived at its ultimate destination, the place to which you walked, as described in your petition.

A. They generally come right along as soon as they can switch out the train and get them started. Probably it does not take over an hour.

Q. I just asked you what they did on those occasions that you know of previous shipments?

A. They have gone right down just as quick as they could hitch on an engine and pull down. It is only a short distance.

By Mr. RHODES:

Q. Were these cattle shipped through in the same cars that the M., K. & T. furnished you?

A. They were.

Q. They were not unloaded *for* the time they were loaded at Stoutsville until unloaded at the Union stock yards?

A. No, sir.

Recross-examination by Mr. JACKSON:

Q. This contract that has previously been shown to you and identified by you and which was signed by you and the agent contains this language, does it not?

Form 1134.

Missouri, Kansas & Texas railway—George A. Eddy and H. C. Cross, receivers.

Rules and Regulations for the Transportation of Live Stock.

No station agent or receiver of this railway has any power or authority to bind the receivers in regard to shipment of live stock, except by written contract in the following form:

Neither has such agent any power or authority to contract to have cars at his or any other station for the shipment of live stock at any given or named date, or to agree to furnish, under any circumstances, any particular class of cars.

All kinds of live stock will be taken under the provision of and at the rates and weights provided for by the tariff classification applying to the territory in which the shipment originates.

35 In case the owner or consignor agrees to hold these receivers free from liability from any and all causes enumerated in the following contract, also agrees to load, unload, feed, water and attend to the stock himself, etc., as specified therein, the rates agreed upon and specified in the contract will be given.

The said receivers of this railway, as aforesaid, will not assume

any liability over the actual value (but in no case exceeding one hundred dollars per head on horses) of live stock except by special agreement.

For the purpose of taking care of the stock, the owner or man in charge, in proportion to the number of cars as endorsed thereon, will be passed on the train with it; and all persons thus passed are at their risk of any personal injury whatever, and will agree to sign release to that effect endorsed on the contract.

Live-stock Contract. (*No.* 10.)

Executed at Stoutsville station, Missouri, November 12th, 1890.

This agreement made between George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, parties of the first part, and M. B. Smizer, party of the second part, witnesseth that, whereas, the receivers of the Missouri, Kansas and Texas railway transport the live stock as per above rules and regulations, and which are hereby made a part of this contract, by mutual agreement between the parties hereto; now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the second party the live stock described below, and the parties in charge thereof as hereinafter provided, namely: six cars said to contain 95 head of cattle m. or l. o. r. from Stoutsville station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union stock yards at Chicago, Illinois, at the through rate of 17½c. per hundred pounds, from Stoutsville, Missouri, to Chicago, Illinois, subject to minimum weights applying to cars of various lengths as per tariff rules in effect on the day of shipment, the same being a special rate,
36 lower than the regular rates, or at a rate mutually agreed upon between the parties, for and in consideration of which said second party hereby covenants and agrees as follows:

1st. That he hereby releases the party of the first part from the liability of common carrier in the transportation of said stock, and agrees that such liability shall be that of a mere forwarder or private carrier for hire. He also hereby agrees to waive release, and does hereby release said first party from any and all liability for and on account of any delay in shipping said stock, after the delivery thereof to its agent, and from any delay in receiving same after being tendered to its agent.

2nd. That the second party hereby agrees to accept and does *except*, for the transportation of his said stock, cars tendered him by the said first party, and agrees that he will see that they are in good, safe condition, and that they are securely fastened so as to prevent the escape of said stock therefrom, and that he will not hold the said first party responsible for any loss or damage that may result from neglect or failure on his part or of his agent or employé to do so; he also agrees to assume, and does hereby assume all risks of injury or loss to his stock because of any defect in said cars; by their being wild, unruly, weak, or maiming each other or them-

selves, or of heat, suffocation or other results of being crowded into the cars, or being injured or destroyed by fire, or on any account whatever, especially caused by burning hay, straw and other materials used for bedding cars or bedding stock or for any purpose; and if any of the said stock shall sustain injury or damage while in transit, the presumption shall be that the same resulted from overloading or from the neglect or inattention of the party of the second part, his or their employés accompanying said stock, for which the party of the first part shall in no respect be liable.

(Written across that paragraph with pen and ink are the words, "minimum weight allowed 20,500 lbs.")

3rd. That at his own risk and expense he is to take care of, feed, water and attend to said stock while the same may be in
37· the stock yards of the said first party or elsewhere awaiting shipment, allowing the same to be loaded, transported, unloaded, reloaded, and to load, unload, reload the same at feeding or transfer points and wherever the same may be unloaded, reloaded for any purpose whatever, and hereby covenants and agrees to hold said first party harmless on account of all loss or damage to said stock while being so in his charge and so cared for and attended to be him or his agents or employés as aforesaid; and in case first party should have any reason to undertake to water or feed said stock, it shall not be liable for any insufficient supplies or imperfect discharge of any such undertaking.

4th. That the said second party for the consideration aforesaid, hereby assumes, and releases said first party from risk of injury or loss which may be sustained by reason of any delay in the transportation of said stock caused by any mob, strike, threatened or actual violence to person or property, from any source; failure of machinery or cars, injury to track or yards, storms, floods, escape or rob-ery of any stock, overloading cars, fright of animals, or crowding one upon another or any and all other causes except the negligence of said first party, and said negligence not to be assumed, but to be proved by the said party of the second part.

5th. That in all cases when the said first party shall furnish for the accommodation of the said second party, laborers to assist in loading or unloading his stock, they shall be entirely subject to his orders and be deemed his employés while so engaged, and he hereby agrees to hold said first party harmless on account of this act.

6th. That, for the consideration aforesaid, said second party further expressly agrees that as a condition precedent to his right to any damages for any loss or injury to his said stock during the transportation thereof, or previous to the loading thereof for shipment, to give notice in writing of his claim therefor to some general officer of said first party or to its nearest station agent or to the agent
at the delivering station on the railroad which carries said stock
38 to destination or to the nearest station agent or general officer of such delivering road before said stock is removed from point of shipment or from the place of destination, and before such stock is mingled with other stock and within one day after the delivery of said stock at its point of destination, before same shall have

been removed, slaughtered or intermingled with other stock, to the end that such claim may be fully and fairly investigated, and the failure to fully comply with the terms of this clause shall be a complete bar to any recovery of any and all such claims. The written notice herein provided for cannot and shall not be waived by any person, except said general officer or station agent, and by him only in writing.

7th. Said second party further agrees for the consideration aforesaid, that in case of total loss of any of his said stock from any cause for which the said first party will be liable, to have for the same the actual cash value at the time and place of shipment, but in no case to exceed one hundred dollars per head, and shall be taken and deemed as a full compensation therefor, and in case of injury or partial loss, the amount of damage claimed shall not exceed the same proportion.

8th. It is further mutually agreed and herein expressly provided that no suit or action against the party of the first part for the recovery of any claim by virtue of this contract shall be sustainable in any courts of law or equity unless said suit or action shall be commenced within forty days next after the damage shall have occurred. Should any suit or action be commenced against said party of the first part after the expiration of the aforesaid forty days, the lapse of time shall be deemed and taken as conclusive evidence against the validity of such claim, any statutes of limitations to the contrary notwithstanding.

9th. That this contract does not entitle the holder thereof or any other person to ride on any train except for the purpose of and in accordance with the rules and instructions printed on the back thereof, all of which are hereby expressly accepted and agreed to be made part of this, our contract.

10th. This contract does not entitle the holder or other
39 parties to ride in the cars of any train except the train in which his stock ride. Neither does it entitle him, the party of the second part named in this contract, so expressly stipulates, admits, and agrees, to return passage from destination to the point of shipment as provided in tariffs and rules in effect on date of shipment, unless this said contract is presented within — days from the date hereof, to the properly authorized agent of these receivers, for return pass, which pass, when obtained, shall be used by those only whose names are written herein, within twenty-four hours after the date of order issued. Nor does it entitle any person except the party of the second part and parties who accompany him in charge of said stock, for the purpose of assisting him in taking care of the same, specified in and upon this contract. It does not include women, infants or other persons unable to do any and perform the service required as expressed in this contract, to such return passage within the said — days. The object, purpose and intent of the return pass being to enable said party of the second part hereto, or his men in charge, as expressed in the contract, and no other person, to return to —— thereon at any time within — days from date hereof and nott hereafter.

11th. For the consideration aforesaid, the said party of the second part hereby further agrees that the said persons in charge of said stock under this contract, shall remain in the caboose car attached to the train while the same is in motion, and that whenever said persons shall leave the caboose car or pass from and along the cars or track they shall do so at their own risk of personal injury from every cause whatever, and that the said first party shall not be required to stop or start its train and caboose cars from depots or platforms, or to furnish lights for the accommodation and safety of such persons.

12th. In consideration of the rates herein named, and the aforesaid covenants, the shipper hereby releases, and does waive and bar any and all cause of action for damages that has occurred to him by any written or verbal contract prior to the execution hereof.

40 13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the roads or road of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto — that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas and Texas railway, excepting to protect the through rate of freight named herein.

14th. No person other than the owner of said stock, or his duly authorized agent in the name of the owner, shall be allowed to sign this contract.

15th. As evidence that the said second party, after fully understanding and accepting all the terms, covenants and conditions of this contract, including the printed rules and regulations at its head on the back thereof, and they all constitute a part hereof, fully assents to each.

(Signed) P. J. GAUEN,
Agent for Receivers of the Missouri, Kansas and Texas Railway.
McCANN & SMIZER, *Shipper-*.

(Endorsed on the back:) Form 1134. Missouri, Kansas & Texas Railway—George A. Eddy and H. C. Cross, receivers. Stoutsville, Mo., 11, 12, 1890. Live-stock contract.

We, the undersigned persons in charge of the live stock mentioned in the within contract, in consideration of the free pass furnished us by the Missouri, Kansas and Texas railway, Geo. A. Eddy and H. C. Cross, receivers, and of the other covenants and agreements contained in said contract, including rules and regulations at the head thereof and thos- printed on the back thereof, all of which

41 for the consideration aforesaid are hereby accepted by us and made a part of this contract, and of the terms and conditions, of which we hereby agree to observe and be severally bound by, do hereby expressly agree that during the time we are in charge of said

stock, and while we are on out return passage, we shall be deemed employés of said receivers of the Missouri, Kansas and Texas railway, for the purposes of said contract stated, and that we do agree to assume, and do hereby assume all risks incident to such employment, and that said receivers shall in no case be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employés.

(Signed) J. O. RICHART.
M. B. SMIZER.

Car numbers.	Initials.
1480	A. & P.
3	M., P. S. Co.
991	C. C. C. C.
1307	P. F. W. & C.
176	P. R. R.
4327	M., K. & T.

Pass on freight trains only.

J. O. Richart, M. B. Smizer, parties in charge accompanying stock.

(Signed) P. J. GAUEN, *Agent.*

NOTE.—Agent will make contract in duplicate, giving one to shipper and returning the other to the freight claim agent, Sedalia, Mo.

(Along the margin of that matter is the following:)

"This pass must be written in ink; otherwise it will not be valid."

Q. Isn't it a fact that this is the same contract, the one I have just read?

A. I suppose it is.

EDWARD BROWN, being duly sworn in behalf of plaintiff-, testified as follows:

42 Direct examination by Mr. RHODES:

Q. What is your full name?
A. Edwin E. Brown.
Q. Where is your place of residence?
A. Chicago, Illinois.
Q. What is your business, Mr. Brown?
A. Live-stock commission business.
Q. What is the firm name to which you belong?
A. Brown Bros. & Smith.
Q. Are you a member of that firm?
A. I am, sir.
Q. Do you know McCann & Smizer?
A. Yes, sir.
Q. I will get you to look at that paper, Mr. Brown. (Paper purporting to be statement from Brown Bros. & Smith to McCann & Smizer is here handed witness.) What is that paper?

A. That is a duplicate account sales of cattle that was made for McCann & Smizer November 17th.

Q. Have you one there with you?

A. Yes, sir.

Q. Well, what is the one you have in your hand?

A. It is the same.

Q. I will ask you if you remember making sale of any cattle for McCann & Smizer on November 17th, 1890, or thereabout.

A. I do, sir. I sold the cattle personally; worked on them from the time they came over until they were sold.

Q. Mr. Brown, do you remember what time these cattle reached Chicago?

A. Yes, sir; Thursday, the 13th, at about 12 o'clock or perhaps a few minutes later; right at 12.

Q. At what point was that where they arrived?

A. At the Union stock yards, Chicago.

Q. Did you see Mr. Smizer that day before that time?

A. Yes, sir.

—. What time did he get there?

A. He got to the stock yards about 8 o'clock.

Q. How many cattle were there in that shipment?

A. Ninety-nine.

Q. I will ask you if those cattle were sold on the day of their arrival.

A. They were not.

43 Q. Why?

—. We couldn't get a bid for them.

Q. Well, why was it that you could not get a bid for them?

A. It was too late for the market that day, at the time those cattle were received. We had but few buyers who were handling extra good, heavy cattle. Eastman's buyer, of New York, was the principal man who was buying the bulk of heavy cattle.

Q. What were these?

A. They were good, heavy cattle; a very fat drove of cattle. By the time the cattle arrived there he had filled his order and didn't buy anything more that week.

Q. If those cattle had arrived there at any time before noon, or, say, from the opening hour of the market, the ordinary, usual time, could they have been sold that day?

A. I think so; yes, sir.

Q. At what price?

A. I received information the day before the cattle arrived that they would be shipped; I knew of the cattle.

Q. Whom did you receive that information from?

A. From McCann & Smizer; that they would be there on the morning of the 13th with this string of cattle. I went to Mr. Burns, who buys for Eastman, of New York, knowing that he would most likely be the best buyer of this string of cattle, and told him what I would have the next morning. Well, he said he wanted them. The next morning I saw him several times, and every time he asked me if the cattle had arrived, and after I met Mr. Smizer I told Mr.

Burns that they were over on the Y, but would certainly be in in a very few minutes, but he waited until almost noon, twelve o'clock. I saw him between eleven and twelve, and he asked me the same question and said that he was still waiting, but was on the trade for other cattle, and if I didn't get my cattle he wanted to close the trade. As soon as the cattle arrived I hunted him up, but he had then filled his order and was out of the market for any more that day.

Q. What could they have been sold for?

A. I think they could have been sold for 5c. a pound.

Q. Now, as a matter of fact, were or were not the cattle sold?

A. They were sold the morning of the 17th.

44 Q. What was the reason, if any, for keeping those cattle over from Thursday until Monday?

A. Simply because we couldn't get a buyer for them. There was no market for them. There was no market for them on Friday. There was scarcely a demand for heavy cattle, especially a large drove; might perhaps buy one or two lots, but those who were buyers of heavy orders had no orders neither Friday nor Saturday.

Q. Now, Mr. Brown, as a matter of fact, what did those cattle sell for on Monday?

A. Ninety-eight head for $4.75 a hundred and one steer for four cents a pound.

Q. Now, what was the reason for the drop in value, if any, from Thursday until Monday?

A. Simply for lack of demand.

Q. That is, the depreciation in the market value from Thursday until Monday?

A. This particular buyer I refer to gets orders Monday morning usually to buy so many cars of cattle during the week, and if he thinks best to buy the cattle before the latter part of the week he does so, and it is often the case that he is not in the market either Friday or Saturday. That happened to be the case that particular time.

Q. State whether or not that class of cattle was lower on Monday that they were on Thursday.

A. Yes, sir.

Q. I will ask you, Mr. Brown, if you have the weights of these cattle.

A. I have, sir.

Q. Will you please give them to the jury—the weights of these cattle in Chicago when they were weighed? They were weighed when they were sold?

A. Yes, sir.

(Witness reads from memorandum: 98 head weighed 154,290; one steer weighed 1,320; total weight, 155,610.)

Q. What does it aggregate?

A. 155,610.

Q. You don't know anything about what they weighed when they were shipped?

A. No, sir.

Q. Will you tell the jury what is the ordinary or usual shrinkage of that class of cattle shipped from Stoutsville, Mo., where these cattle were, to Chicago? On the morning of their arrival there what would be the ordinary shrinkage for that class of cattle per head?

45 A. As far as my information extends, I should say the average would be some place from twenty to forty pounds. There are cases where they do not shrink anything, and again they will shrink a good deal. I have sold cattle in Chicago that would weigh as much as they did in Missouri.

Q. I will ask you as a matter of fact whether or not a shrinkage of eighty-four pounds a head for that class of cattle would be an ordinary or extraordinary shrinkage.

A. I would call it an extraordinary shrinkage.

Q. I will ask you what is the effect upon cattle as to the shrinkage held over from Thursday until Monday; whether they will shrink in weight.

A. Yes; they usually do. It is very seldom that we can get as good weights on cattle after the first day. I have tested it a number of times when we have held cattle over.

Q. I will ask you whether it is not a fact that cattle held over in that sort of way continue to shrink.

A. My experience is that cattle continue to shrink from the time they leave the feed-lot until they are slaughtered. The longer they're kept the more they shrink.

Q. Now, Mr. Brown, what was the expense, if you know, attending the keeping of those cattle over from Thursday until Monday, in the way of a feed bill?

A. The total expense was $74.12—feed, $49.12; corn, $25.

Q. Mr. Brown, suppose that the gross weight of those cattle here being 167,224 pounds—that is the gross weight—they were shrunk here two per cent., leaving a net weight of 163,876. Now, that was their net weight here after shrinking them two per cent. I will ask you, Mr. Brown, that being the case, that being the net weight of the cattle, what would have been the ordinary shrinkage of that class of cattle, reaching Chicago and sold on the market the next day after leaving here?

A. I should say ordinary shrinkage would be from thirty-five to forty pounds.

Q. Figure it at forty pounds.

A. The shrinkage would be 3,960 pounds.

46 Q. You say their weight there was 155,610 pounds?

A. Yes, sir.

Q. Now, take their net weight here, which was 163,876, and I understood you their net weight in Chicago was 155,610 pounds.

A. Yes, sir.

Q. Now, I want to know what the shrinkage was in Chicago, the actual shrinkage was.

A. The actual shrinkage was the difference between 163,876 and 155,610 pounds, or 83 pounds per head.

Q. And it ought to have been not over forty?

A. The average weight in Missouri, after the two per cent. was taken off, was 1,655 pounds, and the average net weight in Chicago was 1,572 pounds, making a difference of 83 pounds.

Q. That was the actual shrinkage, taking the weights as they're given?

A. Yes, sir.

Cross-examination by Mr. JACKSON:

Q. Mr. Brown, what was the name of the gentleman you sold the cattle to?

A. Charlie Reynolds, who buys for Hammond.

Q. You didn't sell to Mr. Burns?

A. No, sir.

Q. He is the man you were talking to?

A. Yes, sir; the man I expected to sell to Thursday.

Q. Was he the only man you tried to sell to on Thursday?

A. No, sir; I tried a number of others.

Q. Was he the only man buying that class of cattle that day?

A. He wasn't the only man buying that class of cattle, but he was paying better prices for strictly fat cattle.

Q. Was there anybody else buying strictly fat cattle?

A. Oh, yes; a number of them, but he was paying more than they were. He was willing to pay more for quality than any other buyer.

Q. How much more was he giving than the others?

A. He was buying a really better grade of cattle.

Q. How much more was be paying per pound?

A. Well, I don't really know that he paid any more per pound. Other buyers paid as much per pound that day for different grade of cattle.

47 Q. Better or worse cattle?

A. Well, there are times when a man will pay more for a drove of 1,350-pound cattle than for a drove of 1,550, because he wants that quality.

Q. Tell the jury whether or not there was anybody but that man that was buying cattle of the class to which these belong.

A. Oh, yes; there were several of them buying cattle of the same class.

Q. Were they paying as much as Burns was?

A. Well, I couldn't say that they were paying really as much, because I expected him to be my best buyer.

Q. That is the reason that you kept after him?

A. Yes, sir.

Q. What was the difference in the price he was paying and what they were paying?

A. Well, I cannot answer that question. I cannot say that they were paying any difference on strictly fat cattle, a drove of fat cattle. There were plenty of other buyers that would buy other classes of cattle.

Q. I am not talking of other classes of cattle. I asked you if there was anybody else buying the same class of cattle on that day.

A. I couldn't get any one else to bid on this class of cattle; there was but that one man.

Q. I understood you to say you had an arrangement with him to wait and look out for these cattle and he did wait, but, these cattle not getting there before twelve o'clock, he bought all he wanted from somebody else, and after that the other buyers were pretty much all filled up.

A. Yes, sir.

Q. With other classes of cattle?

A. Yes, sir.

Q. Now, then, as a matter of fact, there was but one buyer for this class of cattle, and he bought all he wanted without these; hence the market was glutted with this class of cattle that day?

A. No; there wasn't a heavy run. It was glutted after twelve o'clock.

Q. Take the whole day through.

A. The market was quite active, and a good demand in the forenoon.

Q. But there was only one buyer, and he got all he wanted to fill his order without these cattle: hence, adding these to what he bought, it made more than there was a demand for that day?

48 A. Yes, sir.

Q. Mr. Brown, you say Mr. Smizer was at the stock yards about 8 o'clock in the morning?

A. Yes, sir.

Q. The cattle got there about twelve?

A. Yes, sir.

Q. About four hours difference between them?

A. Yes, sir.

Q. You have no personal knowledge where he left the cattle?

A. No, sir.

Q. You were expecting them to come every minute?

A. Yes, sir; and watched very closely for them.

Q. And if they had come almost any time before 12 it would have served the purpose?

A. If they could have got there by 11 o'clock I could have made the sale.

Q. With reference to the Y, it is about three-quarters of a mile from the stock yards, on the main line of the Wabash, is it, what is called 47th street?

A. In the neighborhood of 47th street.

Redirect examination by R. B. BRISTOW:

Q. Mr. Brown, are you acquainted with the matter of time which it requires cattle leaving the region of Stoutsville, Mo., to reach Chicago on an ordinary run?

A. Yes, sir.

Q. I will ask you what time cattle leaving Stoutsville, say, from

any time before noon on Thursday they ought to reach the Union stock yards, in Chicago.

Objected to be defendants' counsel as incompetent, because he has not shown any qualification to speak on the subject.

Objection by the court for the present sustained.

To which ruling of the court in sustaining the objection plaintiff- then and there at the time excepted.

Q. How long have you been engaged in the commission business at the stock yards?

A. Seventeen years.

Q. During that time have you received much or little of stock shipped from this section of the country, from Monroe county?

A. We have handled a great deal of stock from all over this part of the State.

Q. Do you know—are you acquainted with the ordinary time which it takes a shipment of stock from this county to reach
49 Chicago, the length of run it requires?

A. Well, it ought to take about twenty hours.

Objected to by defendants' counsel for same reasons as before.

The answer having been made, the objection is by the court overruled.

To which ruling of the court defendant- then and there at the time excepted and still excepts.

Defendant- then moves to strike out answer, which motion is by the court sustained.

To which action of the court in sustaining the motion plaintiff- then and there at the time excepted and still excepts.

Q. Did you ever ship any stock from this country to Chicago?

A. Yes, sir.

Q. Do you know of your own knowledge of shipments by other people to Chicago?

A. Yes, sir; I tell you what I base my judgment on more than anything else. We very often have cattle at Quincy and Hannibal subject to our orders, and we telegraph them to leave there at a certain time, and, knowing what the time is, we figure on the run to Chicago. That is what I base my judgment on.

By Mr. R. B. BRISTOW: I renew the former question.

Defendants' counsel then renews the objection on the ground that the fact of his having shipped a train-load of cattle, having them held and having telegraphed for them, is no criterion as to what the average time is when running all sorts of ways.

By the COURT: There are two views to take of this: One is that the objection should arise in the way of cross-examination showing his want of information; the other is that he should not be qualified. The understanding is that he is not offered as an expert having acquaintance with these matters. It is ruled that the witness may have knowledge from the usual course of his business as testified to, making him competent to testify; therefore the objection will be overruled, and let the matter come up in cross-examination.

To which ruling of the court defendant- then and there at
50 the time excepted and still excepts.

Q. What would be the usual time for a shipment of cattle leaving Stoutsville any time before noon on Thursday to reach Chicago—the Union stock yards—on the usual run without any unnecessary delays?

A. I should say that cattle leaving Stoutsville at 12 o'clock should arrive not later than 8 o'clock.

Q. At the Union stock yards?

A. Yes, sir.

Q. I will ask you how long it should take a train of cars leaving 47th street, in Chicago, to reach the Union stock yards—leaving the region of 47th street, to reach the Union stock yards.

A. It ought not — take over five minutes.

Q. Mr. Brown, in your examination-in-chief I believe you stated that you could have sold these cattle for five cents on Thursday if they had been in time?

A. Yes, sir.

Q. I will ask you if that was the market value of those cattle on Thursday.

A. It was.

Q. Mr. Brown, I will ask you this question: The same buyer being there, why would he not take them on Monday at the same price?

Objected to by defendant- as incompetent, irrelevant, and immaterial.

Objection by the court overruled.

To which ruling of the court defendant- then and there at the time excepted.

Q. Just state it, Mr. Brown.

A. Because they were stale cattle After a drove of cattle is held over a day or two they are called stale, and buyers don't like to take them.

Q. I will ask you whether or not that had the effect to depreciate their price.

A. Yes, sir; almost invariably depreciates the price.

Defendant- admits the partnership of McCann & Smizer; also the receivership. They also admit the shipment of 95 head of cattle on November 12th, 1890. Defendant- admits the receipt of freight charges, the proper proportion of it for the M., K. & T. and the other for the Wabash. They admit the receipt of the amount due the roads specified, according to the division of charges.

51 EDWIN BROWN recalled by plaintiff-.

By R. B. BRISTOW:

Q. Have you the bill, Mr. Brown, that you had?

A. Yes, sir.

Q. I will ask you if the freight on that stock was paid.

By leave of the court the defendant- withdraws *his* admission on the subject of the payment of the freight.

Q. I will ask you, Mr. Brown, if the freight on this stock was paid.
A. Yes, sir.
Q. By whom?
A. By Brown Bros. & Smith.
Q. What amount of freight?
A. $259.88.
Q. To whom was that paid?
A. That was paid to George T. Williams, secretary and treasurer of the Union Stock Yards Transit Company.
Q. What was it paid to him?
A. The railroad company delivers the stock to the Union Stock Yards Transit Company, and they become responsible to the railroad company for those charges. We pay to the secretary and treasurer of the stock yards transit company the amount of those charges twice a week.

By Mr. JACKSON:

Q. You don't know what the stock yards company did with that, whether they ever settled with anybody or not?
A. No, sir.
Q. You didn't pay the railroad company anything?
A. No, sir.

By Mr. R. B. BRISTOW:

Q. Is that the usual method of payment of freight on shipments of stock?

Objected to by defendant- as incompetent, irrelevant, and immaterial.
Objection by the court overruled.
To which ruling of the court defendant- then and there at the time excepted.

A. Yes, sir.

Plaintiff- here rested and closed *his* case.
Whereupon defendant- offers demurrer to the evidence.
Upon demurrer to the evidence, the court having ruled that the written contract is in evidence, plaintiff- suggests to the court
52 that when that contract was being read to the witness he stated that if the contract was to be in evidence or considered as read in evidence he objected to it on the ground that it was a contract which contains illegal and void provisions against public policy and illegal and void constructions.
The court now rules that the plaintiff- may have the benefit of said objections and of the overruling thereof, and exceptions to the said overruling are by the court accordingly allowed.
And thereupon to the ruling of the court in permitting said contract in evidence plaintiff- then and there excepted at the time and

still excepts, and prays leave of the court to reopen the case so far as to permit *him* to introduce *his* evidence to support the objections specified by *him*, which leave is accordingly granted.

Defendant- does not object to the action of the court in allowing plaintiff- to reopen *his* case, but does object to the character and type of evidence which plaintiff- proposes to introduce and will raise *his* objections whenever the evidence is offered.

To further maintain the issues in *his* behalf plaintiff- recalls M. B. SMIZER, who, having been sworn, testifies as follows:

Mr. R. B. BRISTOW:

Q. I will ask you, Mr. Smizer, if the freight rate paid on this shipment of cattle from Stoutsville to Chicago—17½c. per cwt.—was the usual rates charged for such shipments from that point.

A. It was at that time.

Q. Had you made other shipments about that time?

A. Well, I don't remember whether I made any from that point or not. I think the rate from here and from there differs a little.

Q. I will ask you if there was any special or limited rate, a lower rate, or special contract agreed upon between you and the railroad company.

A. The rate never was mentioned to me at all.

Cross-examination declined.

Mr. TULLY, being called and duly sworn in behalf of plaintiff-, testified as follows:

53 Direct examination by R. B. BRISTOW:

Q. Mr. Tully, where do you live?

A. At Stoutsville.

Q. What is your business?

A. Shipping stock.

Q. How long have you been engaged in that business?

A. About four years.

Q. Engaged in the business of shipping stock from Stoutsville to Chicago?

A. Yes, sir.

Q. Were you engaged in that business in November, 1890?

A. Yes, sir.

Q. Did you ship any stock about that time?

A. Yes, sir; I shipped some the same day that Mr. Smizer and Mr. McCann did.

Q. I will ask you what was the rate per cwt. for stock shipped that time?

A. 17½c. on cattle.

Q. Was that the usual rate?

A. Yes, sir.

Q. At that time the regular rate?

A. Yes, sir.

Q. Is that the kind of contract you made that day when you shipped your cattle?
A. Yes, sir.
Q. That is the contract you always had when you got the rate?
A. Yes, sir.
Q. You didn't know the rate charged when different contracts were made?
A. No, sir.
Q. You shipped some cattle in the same train?
A. Yes, sir.

By Mr. BRISTOW:

Q. Do you know of any different rates than that at all, regular or special, than 17½c.?
A. No, sir.
Q. Did you ever ship without signing a contract?
A. Yes, sir.
Q. Did you get the same rate?
A. Yes, sir; the same rate.
Q. Whether you signed the contract or not?
A. Yes, sir; just the same thing if I go or send a man with them.
Q. You shipped them and went as a passenger, and no contract was signed?
A. No, sir.

Cross-examination by Mr. JACKSON:

Q. Where did you ship cattle without you or somebody for you signing a contract?
A. I shipped them from Stoutsville.
54 Q. Never had any bill of lading or contract or anything for them?
A. No, sir.
Q. How did they know where to send them?
A. The agent knew where to send them.
Q. Knew where to send your cattle? How did he find out?
A. I told him.
Q. You didn't have any contract at all?
A. No, sir; didn't have any contract no more than what he fixed up.
Q. Didn't you sign something or somebody for you?
A. No, sir; I told him.
Q. Did you sign when you and they went to the same place?
A. Yes, sir.
Q. Don't you ship cattle by some other people and they sign a contract for you? Did you ever ship cattle in the care of some one else; some one else shipping and some one go along with them; they signed a contract?
A. Yes, sir; so did I.
Q. Did you never ship cattle for this other party and sign your contract as shipper?

A. Of course they have to sign. The one that goes with them has to sign and the man that ships has to sign.

Q. If nobody goes with it, then does no one sign it? When no one goes with it no one signs it?

A. No, sir.

Plaintiff- again rests and closes *his* case.

Demurrer being submitted, the demurrer is overruled; said demurrer to the evidence being in words as follows:

The court declares the law to be that under the pleadings and evidence the verdict must be for the defendant.-

This being a written paper in the form of instructions, is also by the court refused, and to this action of the court in overruling said demurrer to the evidence and refusing the same as instructions in the case defendant-, by *his* counsel, then and there at the time excepted and still excepts.

To maintain the issues in *his* behalf defendant- called as a witness Mr. FLEMING, who, being duly sworn, testified as follows:

55 Direct examination by Mr. JACKSON:

Q. What is your business?

A. Freight conductor on the M., K. & T.

Q. Were you running on that road in that capacity in November, 1890?

A. Yes, sir.

Q. Do you know anything about this shipment of cattle by plaintiff-, McCann & Smizer?

A. Yes, sir; I got ten cars, stock cars, and an engine and caboose and went there on the 12th of the month to load the ten cars of stock. I suppose it is the stock in question

Q. Were you running as a regular train or as an extra?

A. I went there as an extra; went at 9.15 and left at 11.15; was there two hours.

Q. What were they doing when you got there?

A. I think they were sorting the cattle out there ready to load.

Q. What was the occasion of you remaining there from 9.15 to 11.15?

A. Waiting for them to load the stock. I don't think they were ready to load when I got there; I was waiting for them. I went there on purpose to get them.

Q. What time did you leave Stoutsville?

A. Left there at 11.15 a. m. and arrived at Hannibal at 12.45 p. m.

Q. What length of time?

A. One hour and thirty minutes.

Q. What is the distance from Stoutsville to Hannibal?

A. 34 miles.

Q. How many stops did you have to make on the way?

A. I think I stopped at Clapper and met a passenger train at Monroe—No. 1—and side-tracked for them.

Q. Well, how much time did you lose that you were not running?

A. I didn't lose any time; in fact, leaving Stoutsville at 11.15 only barely gave me time to get to Monroe for the passenger train.

Q. How does the run that you made from Stoutsville to Hannibal, starting at 11.15, reaching Hannibal at 12.45, compare with the ordinary schedule time of freight trains?

A. It was a little faster than common. We had only ten
56 cars, and, of course, could go right along.

Q. Did you take on any other cars on the way?

A. No, sir.

Q. Have you a record of that run?

A. Yes, sir.

Q. State what is the practice and custom in regard to keeping a record of the number of cars that you handle in a freight train and the time of leaving the starting point and arriving at the destination, and so on.

A. We take a copy of the initials of the cars of the different roads, numbers, and kind of cars, what they are loaded with and the destination, seals, etc., and we make out our wheel report from that, and keep the time we leave a station and the time we arrive at the destination.

Q. When do you make those?

A. Make them at the end of the trip.

Q. When do you enter the time at which you leave the *the* station?

A. When I leave there.

Q. Have you a record of the run of this train?

A. Yes, sir.

Q. What does it show?

A. It shows that I left Stoutsville, station No. 34; we always put down the number of the station, Stoutsville is 34; left there at 11.15, 11, 12, 1890; arrived at Hannibal, that is the outer depot No. 2, number of station—arrived there at 12.45 p. m. the same day.

Q. Were you conductor on that train?

A. Yes, sir.

Q. When did you make that entry in regard to the time of leaving station 34, which you say is Stoutsville?

A. Made that leaving Stoutsville.

Q. At the time you left?

A. Yes, sir.

Q. When did you make the entry of arrival at No. 2?

A. I made that on my arrival at the outer depot, 12.45.

Q. What does your record show in regard to the number of cars?

A. Ten stock cars.

Q. Do you know when you made that?

A. When they were loading the stock there at Stoutsville; I put the numbers down after they were all loaded and I went in to take up my bills.

57 Q. You made practically all of that record except the arrival at Hannibal at the time you left Stoutsville?

A. Yes, sir.

Q. Do you recollect that these cars were loaded with cattle?
A. There were two cars of hogs.
Q. Does that show there?
A. Yes, sir; eight with cattle and two with hogs.
Q. Does anybody receipt on that book for anything?
A. The car clerk at Hannibal and at Sedalia receipts for the seals—simply the condition of the seals.
Q. Are the doors sealed?
A. Yes, sir.
Q. When your train arrives at destination he sees if these seals are all right, and if they are——
A. He signs my book.
Q. What does he sign?
A. "Seals O K."
Q. Who is that signed by there?
A. By Mr. Dunn, the car clerk at the outer depot, Hannibal; he takes the number of all cars arriving there in the daytime and inspects the seals.
Q. That terminates your connection with that train, and beyond that you have no personal knowledge?
A. I knew that the Wabash train there would take them right out; they never lay over there.
Q. Was that train waiting there that day?
A. Yes, sir.
Q. You don't know when they went out?
A. No; I don't; they are always put in the train as soon as they are inspected; it takes the carman five or ten minutes to look the cars over.
Q. What do you mean by inspect?
A. To see that the trucks, breakes, and couplings are all right.
Q. So that they are safe to go on?
A. Yes, sir.
Q. Is that matter done there at Hannibal?
A. Always done at all terminal stations.

Cross-examination by Mr. RHODES:

Q. How far it the outer depot from Hannibal?
A. Two miles.
Q. What makes you remember that the Wabash train was waiting there to take the cars?
A. Because they are always waiting for it.
58 Q. I understood you to say that that was a special train?
A. I notified the yardmaster when I left Stoutsville what time I would be there and what I had for the Wabash, ten cars of stock.
Q. That wasn't the usual time for you to arrive there?
A. That was the usual time for me to get there with the extra. We have no time when we run as extra; we get there as soon as we can.
Q. Well, you didn't see anything particular to call your attention to the fact that the Wabash was there?

A. I generally see that the stock gets out.

Q. Is that your business?

A. No; not particularly my business.

Q. I understood you to say that when your stock got there in good shape you went down with it to the same place?

A. That is, my caboose on it. I generally get into my caboose and make out my report and generally see the stock taken off of the caboose and taken down to the Wabash. Our caboose is left in one end of the yard and the stock is taken to the Wabash.

Q. The Wabash depot is two miles from there?

A. No, sir; not the freight depot. It is the same as the M., K. & T. Where the trains are made up is in one end of the yard and the depot in the other.

Q. Do you know where the stock was billed to?

A. Billed to Chicago, care of the Wabash.

Q. I believe you stated that you notified the Wabash?

A. I notified the yardmaster who has charge of the Wabash trains there in the yard the same as he has of the M., K. & T.

Q. Has charge of both trains?

A. Yes, sir.

Q. Leaving the M., K. & T. yards, it is Wabash beyond there and it turns them over to the Wabash?

A. Yes, sir.

Q. Your only recollection about that matter is simply the regular course; you have no special recollection of what occurred that particular time?

A. I think I remember of them going down.

59 Q. Did you go and deliver the stock there?

A. We delivered the stock to them.

Q. Now, was there anything special to call your attention to that train-load of cars outside of any other on that day?

A. I didn't have anything in the train but ten cars of stock. When they cut them off from my caboose I saw them going down.

Q. There was nothing to call your attention to that particular day?

A. No, sir; only I saw the stock going from the caboose; going into another part of the yard.

Q. Do you recollect of it?

A. Yes, sir; they took them off right here.

Q. Didn't you say in your examination that you recollected it because it was the usual way.

A. It is not often that we come in there loaded with nothing but stock, and they don't ever switch the box cars until they get the stock off. They take the stock off first before they switch the rest of the train.

GEORGE HENWOOD, being duly sworn in behalf of the defendant, testified as follows:

Direct examination by Mr. JACKSON:

Q. Where do you live?
A. I live at Oakwood, Mo., about two miles west of Hannibal—southwest.
Q. Is it near what they call the outer depot?
A. Yes, sir.
Q. What business are you in?
A. Yardmaster for the M., K. & T. railroad and for the Wabash at Hannibal.
Q. Joint yards there?
A. Yes, sir; and joint yardmaster.
Q. Are you the joint yardmaster?
A. Yes, sir.
Q. Do you keep a record of the movement of trains in and out of the station there?
A. Yes, sir; there is a record kept of all trains in and out of that station for both roads.
Q. Can you by referring to your record tell when a particular train and indicate it, went in and what became of it?
A. Yes, sir.

Mr. JAMES FLEMING is here recalled and questioned by Mr. Jackson:

60 Q. Mr. Fleming, when you run an extra train does it have a train number?
A. No, sir.
Q. How do you designate it?
A. Mark it "Extra."
Q. Have you any way of designating it by the engine?
A. Yes, sir; and on an extra we carry a green signal; on the regular train we carry no signal.
Q. Have you anything on your books by which we would know that train?
A. There are train numbers in the book, and where this says No. of train this is marked "Extra."
Q. Turn to that one entered that day?
A. Records of cars, train extra, doesn't give any number.
Q. You got the number of the engine that pulled you?
A. Yes, sir; 160; Lyons, engineer.
Q. Was that put down at the time you were at Stoutsville?
A. Yes, sir.
Q. In accordance with the regular custom?
A. Yes, sir.

Examination of Mr. HENWOOD resumed:

Now, Mr. Henwood, I will ask you whether or not from your record you can tell us what time extra train north with engine 160

arrived there and what it had in it and what disposition was made of the cars?

A. Yes, sir; I can.

Q. If you know it without referring to your book—have you examined to see about it?

A. I have looked over the records for that day.

Q. Turn to your record and see where it says there November 12th, 1890, extra, north, engine 160. (Witness refers to book.)

Q. While you are looking at that book you can tell us how many trains do you have there at the outer depot kept record of in a day, on an average.

A. We have, I believe, twenty-two passenger trains that pass through the yard each twenty-four hours; regular freights, between forty and fifty; and then there are extras sometimes.

By the COURT:

Q. Going which way—I suppose east?

A. Both ways. That includes all.

61 Q. This second book that you have just produced is what?

A. Train register.

Q. What do you mean by that?

A. The register that the conductor registers his arrival and the number of his train on when he comes in.

By Mr. JACKSON:

Q. The engine, engineer, number of loads and signals. When does he register that?

A. At the outer depot.

Q. Enters it upon *the* this book?

A. That is what that record is for. (Witness reads:) Here is "Extra," 12.45; Fleming, conductor; engine 160, ten loads, green signals.

Q. When was that made?

A. Mr. Fleming entered that on his arrival at Hannibal at 12.45.

Q. Just read the whole of the entry.

A. 12.45; Fleming, conductor; Lyons, engineer; 160, engine; 10 car-loads, green signals. At the head of it first in here is "Extra," in front of the hour entry that Fleming made when he arrived, "conductor in charge of the train."

Q. This book was made after the cars were checked out?

A. No; that was made when they were checked in by the yard clerk.

Q. Who made that?

A. Mr. David Dunn.

Q. Is that the gentleman who is here?

A. Yes, sir.

Q. This means, if I understand you, that there were that many cars in that train brought in by Fleming?

A. Yes, sir.

Q. And that these were the numbers of the cars and these were

the roads they came from, their initials, and that this up here is the hour of arrival, 12.45?

A. Yes, sir; November 12th, 1890.

Q. And this indicates what in regard to the way the cattle were loaded?

A. Eight cars of cattle and two cars of hogs; seals, 34; that indicates that it came from Stoutsville. Every station has a certain mark on the seal, the station number; the agent is furnished with a seal bearing that number and you can tell by the seal when it was sealed up.

62 Plaintiff and defendant agrees that the numbers in this record produced by Mr. Henwood are the same car numbers as shown by the book Mr. Fleming produced as his train book, and that the records of the cars bear the same numbers as those entries in this contract.

Q. Have you anything to show what disposition was made of these cars and how long a time elapsed before they were turned over to the Wabash?

(Witness produces third book.)

Q. What do you call that book?

A. This is a book of trains going to the Wabash road and this one to the M., K. & T. The entries are made by the same man, by Mr. Dunn.

Q. It is a book showing the trains going to the Wabash from the outer depot?

A. Yes, sir.

Q. What do you show when the train goes out?

A. We show the car number, initials, what the cars are loaded with, the seals and the number of the train they leave in, conductor and the time the train departed and date and from what road, also the seal record.

Q. Now, what is this page the record of, what day?

A. That page is the record of trains 3–4, 76; train 98, all of November 12.

Q. When you say 3–4, 76, explain to the jury what you mean.

A. 76 indicates the No., 3 to 4 indicates the sections. Sometimes we run five or six trains under the same number, but number them in sections. They have a given number for each train that leaves on regular time.

Q. They have a given number for each regular train, but sometimes run four or five trains of the same number; then, if there is more than they can carry in one train, they make up different sections of it?

A. Yes, sir.

Q. And they're called 1st, 2nd, 3rd, 4th sections according to the number they have?

A. That is the idea.

Q. This indicates the 3rd section of No. 76 and this the 4th of No. 76?

A. Yes, sir.

Q. When is this record made with reference to the departure of cars?

63 A. That record was copied from the small book that the yard clerk carries in his pocket and copies it into this, leaving this for record it the office.

Q. When the train is about to go out does he go and take the number?

A. Yes, sir; checks off the cars in the train.

Q. When does he put down the time it leaves?

A. He puts that down in the yard when the train leaves, and when he comes to the office he makes this entry in this book.

Q. Does he come in from there where the trains go out?

A. Yes, sir.

Q. You may explain how the business between the two roads is done, how the transfer is made and where, and what is to be done. For instance, taking a shipment of ten cars loaded with stock, and they are to go out on the Wabash road, what handling is there there, and how is the thing managed?

A. The yardmaster at Hannibal is notified by the transfer agent from Sedalia of the time the stock will arrive over the M., K. & T., and also notifies him of the road that the stock is going over. Say stock is reported to arrive at Hannibal at one o'clock. The yardmaster orders an engine and cars from the Wabash and notifies the Wabash people at Springfield, Ill., what he intends to do. Mr. Fleming arrived that morning at 12.45 with ten cars of cattle. I put in an order for Wabash engine to leave outer depot at 1.20. If you notice in the record, the train left at 1.15 with the stock and took just exactly the same train, the same train precisely.

Q. Left the yards at 1.15?

A. Left the yards at 1.15 and were turned over to the Wabash engine at 1.15 and passed out of the yards.

Q. After they left the yards they went out of your jurisdiction?

A. I had control of them until they left the limits of the yard, but they had been turned over to the Wabash at that time and were moving out.

Q. You acting jointly for both roads?

A. Yes, sir.

Q. You have control of the trains while in the yards?

A. Yes, sir.

Q. When they passed out of the yards then you had no

64 further control of them?

A. No, sir.

Q. They were under the control of the transfer agent of the Wabash?

A. Yes, sir.

Q. Now, then, is there any work to do on the train after it comes in there before it starts out?

A. The train is inspected by men employed for that purpose. Stock trains are usually oiled, and if they are found all right they go ahead.

Q. Then, from that record, they were only in the yard a half an hour?

A. Yes, sir; thirty minutes from the time they arrived until the Wabash had them.

Q. You may state whether or not—how long have you been yardmaster working in the yards?

A. Three years this coming October.

Q. Have you ever had experience in railroad yards before that?

A. Yes, sir; in 1873 I was employed as yardmaster in Springfield, Ill., for the Wabash road.

Q. Have you been railroading all the time since 1873 up until now?

A. Since 1873 up until 1889 in the train service as conductor on the road.

Q. Now, then, from your experience as a railroad man and running trains through the M., K. & T. yards, state whether or not that was reasonable time to consume in the handling of that train.

A. That was very reasonable. We think thirty-five or forty minutes' good work.

By the COURT:

Q. What were your hours of service as yardmaster?

A. Here I go on duty about 6.30 a. m. and remain there until 6 in the evening—sometimes 9 or 10 if I have inside work to do. If I don't get through in the daytime, I remain there at night until 8 or 9 o'clock or later if necessary.

Q. You have an assistant to take charge?

A. Yes, sir; I have an assistant—night yardmaster.

Cross-examination by Mr. J. RHODES:

Q. What did you say your employment was?

A. Yardmaster at Hannibal.

Q. By what road are you employed?

A. Employed by the M., K. & T. and placed down there.

65 Q. You are in the employ of the M., K. & T.?

A. Yes, sir.

Q. They pay you?

A. Yes, sir.

Q. Do you keep books for the Wabash?

A. Yes, sir; it is a joint station and a joint yard.

Q. I don't understand that you keep the books in person?

A. These books are kept by the yard clerk.

Q. What do you call this book?

A. It is a record for entering train records upon.

Q. This is a Wabash book?

A. Yes, sir.

Q. You keep entries in this of the time of the arrivals of trains from the Wabash?

A. Yes, sir.

Q. And in this book you keep the time of arrivals of Wabash trains at Hannibal?

A. Yes, sir.

Q. That is, coming from Chicago from the east over the line of the Wabash?

A. Yes, sir.

Q. Do you keep a record of the trains of the Wabash that run over the M., K. & T.?

A. Then they become M., K. & T., with the exception of the two Cannon Ball trains; they're Wabash trains solid, right through. Wabash engines pull them.

Q. Wabash trains running over the M., K. & T.?

A. Yes, sir.

Q. The two Cannon Ball trains are passenger trains?

A. Yes, sir.

Q. And they have freight trains, too?

A. We handle freight received from the Wabash, but handled by the M., K. & T. That freight is delivered to the Wabash at Moberly.

Q. Is there a train running through over the M., K. & T. as a Wabash train?

A. Not freight trains; no, sir; only those two passenger trains.

Q. Do you know what shipping arrangement they have between the two roads?

A. The business that is done at the station proper is done on a tonnage basis—that is, the switching and handling freight for Hannibal station proper.

Q. Let me understand you. What do you mean by that?

A. In proportion to the length of haul and the weights—the tonnage. They have a joint arrangement by which it is hauled
66 over the M., K. & T. so many miles. That is a little outside of my line. I am just speaking of the yard.

Q. I want to know what is the proportion between the two roads, the charges for transportation.

A. They have an arrangement by which they have an apportionment.

Defendant- admits that there is an arrangement by which they apportion the charges between the two roads, but does not know the proportion which each road gets.

Q. Do you know of your own knowledge?

A. No, sir.

Q. Do you know what contracts exist between the two roads with reference to shipments?

A. No, sir.

Q. But you are the agent of both roads at Hannibal?

A. Yardmaster. I have charge of all Wabash trains coming in until they leave the yard, and all M., K. & T. trains until they leave the yards.

Q. Who orders you to turn these cattle over to the Wabash?

A. I turn them over when they come there myself.

Q. By what authority, what general instructions?

A. The general way of doing business. I was simply notified that that train had ten cars of cattle for the Wabash.

Q. By the M., K. & T. at Sedalia?

A. Yes, sir.

Q. By whom did they notify you? Notified you direct?

A. Yes, sir.

Q. And then you notified the Wabash?

A. I notified the Wabash then what I would do; what time I would start the train and what they would have.

Q. Acting jointly as the agent of the two, that you were acting for the M., K. & T. yard and were agent of the M., K. & T.?

Q. That same report goes from Sedalia to Springfield, Ill., direct. Sometimes they have two or three shipments of stock in there and the Wabash dosen't know just in what shape they're going out until they see what I am going to do. When they pass through the yard they are under my control.

Q. You have control of making up the train there?

A. Yes, sir.

67 Q. Now, the cattle were not reloaded? They were billed through? In other words——

A. I think the billing was through billing. I would not say positive that it was. I believe it was.

Q. You don't rebill them?

A. No, sir.

Q. Is that the Wabash track from the outer depot into Hannibal?

A. No, sir; it is the M., K. & T. track.

Q. After they go out of the yard, over what track do they run?

A. They pass over the M., K. & T. track until they get down into the city, and then they go onto the Wabash track.

Q. And then they go onto the Wabash track at what place?

A. It is a short distance east of the Union depot at Hannibal.

Q. And they own tracks from there on to the bridge?

A. Yes, sir.

Q. You then delivered them to the Wabash on the M., K. & T. tracks?

A. Yes, sir; at the outer depot.

Q. And they are then hauled over the M., K. & T. by the Wabash until they arrive on their own tracks at some point east of the depot?

A. Yes, sir.

Q. And there, for the first time, they were on the Wabash track, and were on the Wabash tracks in Chicago?

A. Yes, sir.

Q. Clear into the city?

A. Yes, sir.

Redirect examination by Mr. JACKSON:

Q. Mr. Henwood, Mr. Rodes asked you who paid you. You draw your pay direct from the M., K. & T., do you?

A. Yes, sir.

Q. State, if you know, whether or not there is an arrangement between the two companies by which your salary, as well as other expenses of running those yards, is divided between them.

A. That is the way it is run.

Q. One company settles all the bills, and then the Wabash pays its share to the M., K. & T.?

A. Yes, sir.

Q. Otherwise the men would have to go to two places to get their pay?

A. Yes, sir.

68 Q. This place where you turned them over, is that the usual place for making up cattle trains?

A. That is the place where we make up all M., K. & T. and Wabash freight trains.

Q. Southwest of the yard?

A. Yes, sir.

By Mr. RHODES:

Q. Do you understand that the M., K. & T. has authority to make contracts over the Wabash?

A. No, sir; my understanding is that the shipper would get a contract over the Wabash at the freight depot. In this case I could not say as to whether he did or not.

DAVID DUNN, being duly sworn in behalf of the defendant-, testified as follows:

Direct examination by Mr. JACKSON:

Q. Mr. Dunn, state what position you held in November, 1890.

A. Yard clerk at the outer depot at Hannibal.

Q. What was your duty?

A. To check the number of cars in a train when they were run to the outer depot before leaving after the train is made up.

Q. Do you have any duty with reference to examining the seals?

A. Yes, sir; that is my duty; to examine the seals at the outer depot and take the number of cars.

Q. State whose writing that is on there (showing witness book).

A. That is mine.

Q. These words read, "Seals O K, D. Dunn, 11, 12, '90"?

A. Yes, sir.

Q. What does that indicate?

A. That the seals were O K. We check each train that way arriving and departing from the outer depot.

Q. Can you tell from that record what time that train arrived?

A. Yes, sir; 12.45 p. m.; three-quarters of an hour after noon.

Q. Was that the time you made this entry?

A. Yes, sir.

Q. What other duty did you have to perform with reference to these cars?

A. To take the numbers.

Q. How was that done—into what?

A. Into a small book.
Q. Is that the book?
A. Yes, sir; this is the book I have to take the numbers of each train.
69 Q. Where do you do that; out in the yard?
A. Out in the yard.
Q. When?
A. After the train arrives at the outer depot and stops there in the yard.
Q. What is it you have in regard to the arrival of the train on the 12th of November, 1890; extra, north, engine 160?
A. Yes, sir; that is the engine number, and I have the time she arrived.
Q. What time?
A. 12.45 p. m.
Q. Did you put that down at the time she arrived?
A. Yes, sir.
Q. Is that a part of your duty?
A. Yes, sir.
Q. What else do you find? How many cars do you find in the train?
A. Ten.
Q. What were they loaded with?
A. Eight with cattle and two loaded with hogs.
Q. Do you ever transfer that to any other book?
A. Yes, sir; transfer it to a large book—record that I keep in the office there.
Q. See if this is the one produced by witness Henwood.
A. Yes, sir; that is the one.
Q. Whose writing is that; is that yours?
A. Yes, sir; that is mine.
Q. Is this a copy of what you entered in the little book?
A. Yes, sir.
Q. That shows that the train run by Fleming, conductor, arrived at 12.45?
A. Yes, sir.
Q. Now, then, what duty, if any, do you perform with trains going out—going east over the Wabash?
A. Just the same as I do with those of the M., K. & T.
Q. You are the clerk in the yardmaster's office, are you?
A. Just a joint yard clerk at the outer depot.
Q. That is where the office is?
A. Yes, sir.
Q. Did you make any record of these cars that you have recorded as arriving at 12.45; any record of their departure over the
70 Wabash?
A. Yes, sir; I have a little book for that—the same book.
Q. Is it in that book?
A. Yes, sir.
Q. Have you entered it there, and did you transcribe it to another book?

A. Yes, sir; into the large book.
Q. Is this the book and is that the entry here?
A. Yes, sir; this is it here, 4–76.
Q. You transcribed from the little book about the departure of it?
A. Yes, sir.
Q. Whose writing is this?
A. It is mine.
Q. That was made up and copied from that little book?
A. Yes, sir.
Q. The little book entries were made at the time of making up the train and its departure?
A. Yes, sir.
Q. Did you know of its departure from there at the time?
A. Yes, sir.
Q. When you note the departure of a train is the engine headed in the front and the caboose on behind?
A. Yes, sir; moving out.
Q. You record the departure?
A. I record the time just as she starts to pull out of the yard.
Q. What time did this train, made up as a Wabash train, start out of those yards on that day?
A. I got the time that the train left the outer depot.
Q. What time is it?
A. I didn't record the time she was made up; she left the outer depot at 1.15 p. m. November 12th.
Q. That is, a half an hour intervened from the arrival until then?
A. Yes, sir.
Q. During that time they were making up the train, inspecting, oiling it, etc., you were out there taking down the numbers of the cars?
A. Yes, sir; and examining the seals.
Q. And this is the record of the departure of the Wabash?
A. Yes, sir; with the numbers of the cars, the initials, and what they were loaded with.
Q. How many cars went out?
A. Ten cars.
71 —. What were they loaded with? Have you entered that?
A. Eight with cattle and two with hogs, and it went out as 4–76.
Q. And you got the name of the conductor who took them?
A. Yes, sir.

It is admitted that the cars entered in the departing Wabash train are the same as referred to in the other books and in the contract.

Cross-examination by Mr. RHODES:

Q. What is your name? (I didn't understand it.)
A. David A. Dunn.
Q. What is your business?
A. Yard clerk at the Hannibal outer depot.
Q. Whom do you work under?

A. Mr. George Henwood, yardmaster at the outer depot.
Q. By whom were you employed?
A. By the M., K. & T.
Q. Who owns those yards there?
A. The M., K. & T.
Q. Owns all the track down to where the Wabash begins, some place east of the Union passenger depot?
A. Yes, sir.
Q. The Wabash then runs how far over the M., K. & T. tracks before it arrives at its own tracks—how far east from the outer depot to the Wabash track?
A. About two miles, I guess.
Q. They receive them on the line of the M., K. & T. and move them part of the way over the M., K. & T. tracks?
A. Yes, sir.
Q. You say that is a joint service out there, the Wabash and the M., K. & T., but all of them are servants of the M., K. & T., are they?
A. I believe so.
Q. All paid by the M., K. & T.?
A. Yes, sir.
Q. The tracks and yards owned by the M., K. & T. at the outer depot?
A. Yes, sir.
Q. And those cars that you examined there at Hannibal went on straight through on to the Wabash?
A. Yes, sir.
Q. And the cattle were not reloaded or rebilled?
A. I don't know anything about the billing. I don't handle the bills.
72 Q. Where were they marked to? How can you tell where they are going?
A. Going to Chicago.
Q. How did you get that information?
A. A man keeps a record in the office there.
Q. Can you tell by looking at the car where it is going?
A. No, sir.
Q. All you know is by some memorandum handed to you?
A. There is no memorandum handed to me at all.
Q. How do you know?
A. We keep a record there in the office. The car clerk keeps a record in a large book and enters each car and the contents, destination, and where they're from.
Q. So all the hands at that depot are paid by the M., K. & T.?
A. Yes, sir; I believe they are.
Q. And are in the employment of the M., K. & T.?
A. Yes, sir.
Q. The same cars go through, but the same engines do not?
A. No, sir; Wabash engines and Wabash crews.
Q. Can you tell me by looking at this book what cars these are

you have got the initials of? Tell me what cars they are; tell me the initials.

A. There's five of them M., K. & T. cars; one P. R. R.

Q. What is that?

A. Pennsylvania railroad. P., F. S. & C. and C. C. C. C., Canada cattle cars; M., S. C.; A. & P.

Q. What road is that?

A. Atlantic and Pacific.

Redirect examination by Mr. JACKSON:

Q. In regard to this payment, you perform similar duties for both roads?

A. Yes, sir; I do.

Q. Do you know whether or not it is a fact that the Wabash reimburses the M., K. & T. part of what it pays out for expenses?

A. I don't know anything about that.

Q. This little book in which you receipt these cars, what is that, whose writing is that?

A. That is my writing there. That shows the conductor who brought them in.

Q. And that shows the conductor who took them out?

A. Yes, sir.

73 Q. 1.15 p. m. is marked on there; is that marked at the time it started?

A. Yes, sir; at the time she left the outer depot.

By one of the JURY:

Q. Did you say the train left at 1.15?

A. Yes, sir; left at 1.15.

Q. Do you ever bill them out ahead of time when they are behind in order to give them a chance to make up time?

A. I don't know anything about that.

Q. Or report them ahead of time when they are behind time?

By Mr. JACKSON:

Q. These entires here, 1.15 and similar entries showing the departures of trains, I understand you to say, you do not make until the train is actually starting to move away?

A. That is when I make it, as the train moves away.

Q. Was that the usual place for transferring cattle cars from one road to the other in these yards?

A. Yes, sir.

Q. On the tracks near the outer depot?

A. Yes, sir.

Defendant here rested and closed his case.

This was all the testimony in the case.

The plaintiff- did not ask any instructions at all, and thereupon the defendant- prayed the court to give instructions numbered one, two, and three, as follows:

I.

The court instructs the jury that under the pleadings and the evidence your finding must be for the defendants.

II.

The court instructs the jury that under the contract read in evidence, under which plaintiffs' cattle were shipped, the defendants are not liable for any damages sustained by delays or otherwise after said cattle were delivered by defendants to the next connecting carrier.

III.

The court instructs the jury that defendants are not liable, under the contract of shipment read in evidence, for any damages or delays occur-ing on any other railroad than the one operated by defendants, and if you find from the evidence that defendants
74 transported plaintiffs' cattle from Stoutsville to Hannibal without unreasonable delay and delivered said cattle to the Wabash Railway Company, as the connecting carrier, within the time usually and reasonably required for such transportation and delivery; that the defendants are not liable in this case, notwithstanding said cattle may have been unreasonably delayed on said Wabash railroad, and your finding should be for the defendants.

Which instructions, and each and all of them, the court refused to give; to which action of the court in refusing to give said instructions, and each and all of them, the defendant- then and there duly excepted at the time; and thereupon the court, of its own motion, gave eight instructions, numbered from one to eight, inclusive, as follows:

I.

If from the evidence the jury find that beyond the limit of a reasonable time for the delivery of plaintiffs' cattle at the Union stock yards at Chicago, Illinois, the Wabash Railway Company negligently delayed said delivery and thereby directly caused pecuniary damages to plaintiffs in the disposition of said cattle, the jury will find for plaintiff-, and in default of such finding the jury will find for defendant-.

II.

Negligence is the failure to exercise such care and prudence as a person of ordinary care and prudence would ordinarily exercise in performing a duty under all and the same circumstances and with the same information in the control, conduct, and management of such person's own affairs.

In the case at bar it was the duty of the Wabash Railway Company to not delay the delivery of plaintiffs' cattle at the Union stock yards in Chicago, Illinois, beyond the limit of a reasonable time for said delivery.

Unless from the evidence the jury find the Wabash Railway Company guilty of non-performance of said duty and of negligence

in said non-performance of said duty the jury will find for the defendants.

75 III.

If from the evidence the jury find for the plaintiff-, the measure for plaintiffs' damages, if any, will be the difference between the reasonable market value of plaintiffs' cattle, if any, at Union stock yards, Chicago, Illinois, on a delivery there within a reasonable time and the reasonable market value, if any, of said cattle at said place at the time when actually there delivered, if a less value.

IV.

If from the evidence the jury find for plaintiff-, and that the non-delivery of said cattle in reasonable time, if any, directly deprived plaintiff- for a time of any market for said cattle, the jury, in assessing plaintiffs' damages, if any, will allow plaintiff- the difference between the reasonable market value per pound of weight at Chicago, Illinois, at the time of a delivery in reasonable time and the reasonable market value per pound of weight at Chicago, if a less weight, at the time when a market for said cattle first accrued after there delivered; but such element of damage, if allowed, cannot exceed one-fourth of a cent per pound of the weight at which said cattle were actually weighed on sale, and the same may be as much less than said amount as from the evidence the jury may determine, the alleged one-fourth of one cent per pound being the utmost possible maximum in the weight at which said cattle were actually weighed on sale.

V.

If from the evidence the jury find for plaintiff-, and that the non-delivery of said cattle within reasonable time, if any, directly deprived plaintiff- for a time of any market for said cattle, and that pending said interval the said cattle were thereby directly caused to suffer shrinkage in weight exceeding ordinary and usual shrinkage of cattle in reasonable transit under same circumstances, the jury, in assessing plaintiff's damages, if any, will also allow the reasonable market value, if any, of such flesh so lost by such shrinkage pending such delay.

76 VI.

If from the evidence the jury find for plaintiff-, and that the non-delivery of said cattle within reasonable time, if any, directly deprived plaintiff- for a time of any market for said cattle, and that pending said interval, the plaintiff- *was* thereby directly caused to furnish feed for and to said cattle, the jury, in assessing plaintiffs' damages, if any, will also allow the reasonable market value, if any, of said feed so furnished by plaintiff- at Chicago, Illinois, pending such delay.

VII.

The total amount of damages, if any, cannot exceed six hundred and fifty-four dollars and twelve cents.

VIII.

If from the evidence the jury find for the plaintiff-, their verdict may be in the following form, filling the blanks with ciphers or amounts in money, as the jury may find from the evidence:

We, the jury, find for the plaintiff-, and assess *his* damages as follows, to wit:

For feed.....
For extra shrinkage in weight .....
For reduction in value of weight sold.....

Total .....

—— ——, *Foreman.*

Or if the jury find for plaintiff-, the jury may render verdict in the following form:

We, the jury, find for the plaintiff- and assess *his* damages at the sum of ——.

—— ——, *Foreman.*

If the jury find for defendant- the verdict may be in the following form:

We, the jury, find for the defendant-.

—— ——, *Foreman.*

To which said instructions given by the court of its own motion, and to each and all of them, the defendants objected; but the
77 court overruled said objections and gave said instructions notwithstanding; to which action of the court in overruling said objections and in giving said instructions of its own motion, and each and all of them, the defendant- then and there duly excepted at the time.

And thereupon the jury retired to consider of their verdict, and again, on the same day, returned a verdict for the plaintiff- as set forth in the judgment entered thereon; and thereupon, on the same day, the defendants filed a motion for new trial in words and figures as follows (omitting caption):

Now come the above-named defendants and move the court to set aside the verdict and judgment rendered and entered in the above-entitled cause and to grant a new trial therein for the following reasons:

I.

Because the court erred in admitting illegal and incompetent evidence offered by the plaintiffs over the objections of the defendants.

II.

Because the court erred in refusing to sustain the demurrer to the evidence asked and offered by the defendants in the nature of an instruction.

III.

Because the court erred in refusing to give legal and proper instructions prayed by the defendants.

IV.

Because the court erred of its own motion and gave illegal and improper instructions to the jury over and against the objections of defendants.

V.

Because the verdict is against the evidence and against the law and against both the law and evidence.

VI.

Because the judgment is against the evidence and against the law and against both the law and the evidence.

VII.

Because there is no evidence to support either the verdict of the judgment.

78 VIII.

Because the verdict and judgment each and both of them are for the wrong party, being for the plaintiffs when they and *and* each of them should be for defendants.

IX.

Because there is no evidence in the case to support or warrant the instructions given by the court.

X.

Because the verdict and judgment are contrary to and in conflict with the constitution of the State of Missouri and the Constitution of the United States.

XI.

Because the instructions given by the court are contrary to and in conflict with the constitution of the State of Missouri and the Constitution of the United States.

XII.

Because section 944 of the Revised Statutes of Missouri, relied upon by the court and by the court construed as applying to and controlling the contract of shipment under which plaintiffs' cattle were shipped from Stoutsville, Mo., to Chicago, Illinois, is contrary to and in conflict with the constitution of the State of Missouri and the Constitution of the United States.

JACKSON & MONTGOMERY,
Attorneys for Defendants.

And upon the next day, the same being the 28th day of April, 1892, said motion was taken up and submitted to the court, and, having been seen and considered, was by the court overruled; to which action of the court in overruling said motion and in refusing to grant a new trial the defendants then and there duly excepted at the time.

And thereupon leave was given to the defendants to file their bill of exceptions on or before August 1st, 1892.

And the defendants now tender this their bill of exceptions and pray that the same may be signed, sealed, filed, and made a
79 part of the record in this cause, which is accordingly done this 21st day of June, 1892.

THOS. H. BACON, *Judge.* [SEAL.]

JACKSON & MONTGOMERY,
Attorneys for Appellants.

And afterwards, to wit, on the 15th day of January, 1894, the respondents filed their motion to dismiss the appeal herein; which said motion is in words and figures as follows, viz:

In the Supreme Court of Missouri, October Term, 1893.

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Appellants. } Case No. 6391.

Appeal from Monroe circuit court.

To the above-named appellants:

Please take notice that the respondents in this cause will move said court on Monday, January 15, 1894, in division No. 2 of the said court, to dismiss the appeal in the above-entitled cause for failure to comply with rule 15 of said court requiring you to serve upon the respondents your brief in said cause, as required in said rule.

RODES & RODES AND
R. B. BRISTOW,
Attorneys for Respondents.

In the Supreme Court of Missouri, October Term, 1893.

McCANN & SMIZER, Respondents,
vs.
80 GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway, Appellants. } Case No. 6391.

Appeal from Monroe circuit court.

And now comes the respondents herein and moves the court to dismiss the appeal in this cause for the reason that the appellants

have failed to comply with rule 15 of this court in this, that the appellants have not delivered or served or caused to be delivered or served upon the respondents or *his* attorney any brief in the above-entitled cause 30 days before the day on which this case is set for hearing, and because no brief of the appellants have been delivered or served upon the respondents or their attorneys of record in this cause.

RODES & RODES AND
R. B. BRISTOW,
Attorneys for Respondents.

STATE OF MISSOURI, } ss:
County of Pettis, }

Personally appeared before me J. H. Rodes, the undersigned, and, being duly sworn, says that he served a certified copy of the within notice and motion on John Montgomery, Jr., at 9 o'clock a. m. on Saturday, January 13, 1894, by delivering a certified copy thereof to said Montgomery, of the firm of Jackson and Montgomery, at the court-house in the city of Sedalia, Missouri.

[SEAL.] Subscribed and sworn to before me this 13th day of January, A. D. 1894.

T. A. FOWLER, *Cir. Cl'k.*

And on the same day the further following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents, *vs.* GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway Company, Appellants.	Appeal from Monroe County Circuit Court.

81 Now, at this day, this cause coming on to be heard, and it appearing to the satisfaction of the court that the said appellants have failed to comply with the rules of this court, doth consider and adjudge that the appeal herein be, and the same is hereby, dismissed, and that the said respondents recover against the said appellants their costs and charges herein expended and have therefor execution.

And afterwards, to wit, on the 16th day of January, 1894, the further following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Come now the said appellants, by attorney, and file their affidavits in opposition to the motion to dismiss the appeal herein; and, on motion, it is ordered that the said respondents be granted 10 days in which to file counter-affidavits.

Which said affidavits are in words and figures as follows, to wit:

STATE OF MISSOURI, } ss:
County of Pettis, }

Geo. P. B. Jackson, being duly sworn, on his oath states that he is one of the attorneys for the defendant- and appellant- in the case of McCann & Smizer, respondents, *vs.* Eddy & Cross, appellants, No. 6391, pending in division No. 2 of the supreme court. This affiant says that he prepared and had printed the statement, brief, and argument on behalf of the appellants in the above case in November, 1893, and that he caused a copy thereof to be served upon J. H. Rodes, one of the attorneys for respondents, during the month of November, 1893; that on Thanksgiving day in November, 1893, the said attorney, J. H. Rodes, was in the office of this affiant, and brought with him the copy of said brief, etc., which had been served upon him, and examined the authorities cited by the appellants in said brief, using affiant's books therefor, and at the same time and place discussed the said case and the points made and authorities cited.

82 Affiant farther states that on the 8th day of January, 1894, this affiant was in Jefferson City, in attendance upon the supreme court, and whilst there inquired of the clerk if the briefs had been filed in said cause, and Mr. Fisher, the deputy clerk, examined and said that they were only filed upon one side; whereupon this affiant remarked, "Those are the briefs for the appellants," and Mr. Fisher replied that they were. This affiant farther states that he has been of the impression since said November that said briefs were on file, as he had directed them to be sent to the clerk, and the above conversation with the clerk and the deputy assured him that his understanding had been correct, and he therefore paid no farther attention to the matter; that it is still the impression of this affiant that said briefs were filed some time ago, but that if they were not it was a mere oversight and an omission on the part of the clerk in the office of affiant to carry out affiant's instructions to forward them after the same had been served in November last, and which oversight or omission would have been corrected except for the conversation above mentioned in the clerk's office of the supreme court, and that if it is a fact that said briefs are not on file, as claimed by the respondents, and if the deputy clerk was mistaken in his statement made to this affiant on the 8th of January, it arose from the fact that the abstract of the record was bound separately from the statement and brief, but whether this is the explanation of the conversation and statement of the said clerk this affiant is unable to state; but whether or not the said briefs are on file this affiant reiterates that they were served upon and used by the said attorney, J. H. Rodes, as early as Thanksgiving day in November, 1893.

GEO. P. B. JACKSON.

Subscribed and sworn to before me this 15th day of January, 1894.

[SEAL.] E. B. QUISENBERRY,
Notary Public.

And afterwards, to wit, on the 22nd day of January, 1894,
83 the following affidavit was filed in said cause, viz:

STATE OF MISSOURI, } ss:
County of Pettis, }

This day personally appears before me J. H. Rodes, who, being first duly sworn, says that he is one of the firm of "Rodes & Rodes," attorneys for the respondents in the case of McCann and Smizer, respondents, *vs.* Eddy and Cross, receivers, etc., appellants, No. 6391, lately pending in division No. 2 of supreme court of Missouri; that he has read certified copies of the affidavit of C. C. Jackson and George P. B. Jackson, filed in said cause, procured by writing to the clerk of the supreme court, and referring first to the affidavit of the said C. C. Jackson most unequivocally and positively denies that he, the said C. C. Jackson, or any one else delivered to him, the said Rodes, a copy of appellants' printed statement, brief, and argument in said cause during the month of November, 1893, or at any other time, as aver-ed in the affidavit of said C. C. Jackson, aforesaid, and the said J. H. Rodes denies that he ever had or saw a copy of the said brief, statement, and argument on different days or any day before Thanksgiving day or on said day or on any day or days before or since, as in said affidavits contained or either of them (except as will hereinafter be stated), and the said J. H. Rodes most unequivocally and positively denies that he acknowledged service of said brief at any time, or that a copy of the same was ever handed him or said acknowledgement of service ever requested of him by the said C. C. Jackson or any one else, and denies that a copy with the acknowledgement of service of the said Rodes was ever mailed to the clerk of the supreme court or could have been mailed, for reason that no brief was ever handed or delivered him for said purpose or any purpose, as stated in said affidavit-, or either or both of them. Affiant says that the only foundation that he can conceive of for the statements contained in said affidavits or either of them that "he had said brief in said office" is the fact that the said Rodes at several times has used the books in the library of the said Jackson & Montgomery in examining the law
84 of said case, and for this purpose has gone to said office, carrying with him a bound and printed abstract of the record in said case of McCann and Smizer *vs.* Receivers, which is hereto attached and profert made of the same, the service of which was acknowledged by the said Rodes at the request of the said Geo. P. B. Jackson long prior thereto. Moreover, the said affiant says that the only time he had any knowledge of the existence of said briefs alleged to have been served as aforesaid was on Thursday or Friday (either the 11th or 12th of January, 1894), being the only Thursday or Friday before the Monday following which said cause was set for hearing, when he, the said J. H. Rodes, went to the office of Jackson & Montgomery for the purpose of serving a copy of a motion and notice thereof to dismiss said cause, and, finding neither of said firm in the office, he asked the said affiant, C. C. Jackson, if he knew why briefs in the McCann and Smizer case had not been

served upon counsel for respondent-; whereupon the said C. C. Jackson said he did not know; that he supposed it had been done, and asked if I was sure the case was for trial at this term of the supreme court. I assured him this was my understanding, and he suggested that it was possible the brief had been served upon some one else (other counsel in the case); whereupon I asked him if his office record would not show and if he did not keep records of filings, etc. He said, "Yes," and went to look at his office record, and, after doing so, said, "Well, the last record is the service of an abstract of the record;" and at said time he neither claimed or intimated or suggested that he had served the same upon this affiant in November or at any other time, and affiant says that since the filing of said affidavits he has seen and conversed with both the said C. C. Jackson and G-orge P. B. Jackson, and that neither of them claim or have ever claimed or mentioned to this affiant the fact that they or either of them served or caused to be served a copy of said statement, brief, and argument, as in said affidavits claimed, and never at any time before or since filing said affidavit- have they or either of them claimed to have served the same to this affiant.

85 This affiant says that the time and place above mentioned, on Jan. 11th or 12th, 1894, the said C. C. Jackson went to the files in said office and procured what purported to be a brief in said cause and laid the same on the desk by the side of the said J. H. Rodes. This affiant says that this is the first time he ever saw said brief or had any knowledge directly or indirectly of the existence of the same, and that he never took the same out of said office, nor has he ever examined the same or any part thereof; to all of which he solemnly swears in manner and form as hereinabove stated.

J. H. RODES.

Subscribed and sworn to before me on this the 20th day of January, 1894. May 24, 1897, my term expires.

W. J. CRAWFORD,
[SEAL.] *Notary Public.*

And afterwards, to wit, on the 29th day of January, 1894, the following affidavits were filed in said cause, viz:

STATE OF MISSOURI, } ss:
County of Pettis, }

This affiant, C. C. Jackson, being duly sworn, on his oath states that he has read a copy of an affidavit of J. H. Rodes, filed in the supreme court in the case of McCann & Smizer against Eddy & Cross, receivers, which said copy has reached this affiant in the city of Sedalia on this date; that since reading the same affiant reiterates all he said in a former affidavit filed in the same cause.

Affiant further states that he did not on the 11th or 12th of January, 1894, or at any other time, state to said J. H. Rodes that they kept a record of service of any briefs or abstracts or other papers, because it is not and has not been the custom in the office to keep a record of such service.

Affiant further states that he did not say, "Well, the last record is the service of the abstract of the record," and this affiant says that there is no such record in the office as "service of the abstract of the record."

Affiant further states that he has not had any conversations whatever with said J. H. Rodes since the filing of his motion to
86 affirm in this cause.

C. C. JACKSON.

Subscribed and sworn to before me this 29th day of January, 1894.

E. B. QUISENBERRY,
[SEAL.] *Notary Public.*

My commission expires Feb. 8th, 1897.

STATE OF MISSOURI, } ss:
City of St. Louis, }

George P. B. Jackson, being duly sworn, on his oath states that he has read a copy of an affidavit of J. H. Rodes, filed in the supreme court in the case of McCann & Smizer against Eddy & Cross, receivers, which said copy has reached this affiant in the city of St. Louis on this date; that since reading the same affiant reiterates all he said in a former affidavit filed in the same cause.

Affiant farther states that he has not had any conversation with the said Rodes concerning the said case of McCann & Smizer since Thanksgiving day, in November, 1893; that he has not spoken to or with the said Rodes upon any subject whatever since the time of filing the motion to affirm the above case, except on one occasion the said Rodes and this affiant met for the purpose of agreeing upon and filing a bill of exceptions in another case, and there was no occasion for speaking of the other matter, and this affiant, being anxious to get through with that matter and take up other business that was calling for attention, did not think of the case of McCann & Smizer.

This affiant farther states that he was not present in his office, but was absent in the State of Texas for some days prior to the morning of January 14th, when at about 10 or 10.30 a. m. he first heard of the motion to affirm said judgment, and he is unable to express any opinion as to what occurred in the office on the 11th and 12th of January; but this affiant does say that some time in November, when the briefs in the above case were received from
87 the printer, he called the attention of C. C. Jackson to the same and told him to ascertain whether or not J. H. Rodes was in town, and he telephoned to the office where the said Rodes spent most of his time and the reply was received to the effect that Rodes was there, and affiant states that the said C. C. Jackson then started with several copies of the said brief, stating that he was going to make service on Rodes, and that in a short time he returned and affiant asked him if he had found Rodes and had given him a copy of the brief, and he stated that he had.

Affiant farther states that he is not mistaken about what it was that the said Rodes had on the table in the office of affiant on Thanksgiving day; that it was not a copy of the abstract of the record, but was a copy of the brief in this case; and affiant farther states that there was nothing in the abstract of the record in this case which would assist the said Rodes in examining the law of the case or would suggest to him any cases or authorities that might be cited, but that the citation of authorities was made in the said brief.

GEO. P. B. JACKSON.

Subscribed and sworn to before me this 27th day of January, A. D. 1894.

[SEAL.] JOHN S. KING,
Notary Public.

My commission will expire April 7th, 1895.

And afterwards, to wit, on the 31st day of January, 1894, the following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Come now the said appellants, by attorney, and file their motion to set aside the dismissal of this cause heretofore entered herein; which being fully considered by the court, it is ordered that said dismissal be, and the same is hereby, set aside; that this cause be reinstated on the docket and continued, and that the said appellants be granted 30 days in which to serve the said respond-
88 ents with copies of brief and that the said respondents be granted 30 days in which to file briefs.

Which said motion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1893.

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY & H. C. CROSS, Appellants.

Now come the above-named appellants and moves the court to reinstate the above-entitled cause for the reason that the same was dismissed under a misapprehension on the part of the court of the fact in regard to the service of brief by the appellants; that the attorney of appellants who was in charge of said case was absent in Texas until the morning of January 14th, on which day the said case was dismissed; that notice of the motion to dismiss was first left in his office with the clerk on Saturday, January 12th; that immediately upon receiving notice of said motion at about 10.30 a. m. on January 14th, the said attorney at once set about to prepare affidavits, which have already been filed in this cause, and to which

reference is now made, and it is asked that the same be considered in support of this motion.

JACKSON & MONTGOMERY,
Attorneys for Appellants.

And afterwards, to wit, on the 16th day of April, 1894, the following further proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Come now the said parties by attorneys and submit this cause to the court on briefs.

And afterwards, to wit, on the 30th day of June, 1894, the further following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEORGE A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway Company, Appellants.
89

Appeal from Monroe County Circuit Court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid in form aforesaid by the said Monroe county circuit court rendered be reversed, annulled, and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of the said judgment. It is further considered and adjudged by the court that the said appellants recover against the said respondents their costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, April Term, 1894. Division No. 2.

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Receivers Mo., K. & Tex. R'y Co., Appellants.

Appeal from Monroe Circuit Court.

Opinion.

Hon. THOS. H. BACON, *Judge:*

Action to recover damages based on delay in the shipment of a lot of cattle from Stoutsville, in Monroe Co., Mo., to Chicago, Ill.

The delay complained of occurred in the latter State and on a connecting road.

The contract on which this action is bottomed is, so far as necessary to quote it, the following:

"*Rules and Regulations for the Transportation of Live Stock.*

No station agent or receiver of this railway has any power or authority to bind the receivers in regard to shipment of live stock except by written contract in the following form: * * *
90 All kinds of live stock will be taken under the provisions of and at the rates and weights provided for by the tariff classification applying to the territory in which the shipment originates.

In case the owner or consignor agrees to hold these receivers free from liability from any and all causes enumerated in the following contract, * * * the rates agreed upon and specified in the contract will be given."

"*Live-stock Contract* (*No.* 10).

Executed at Stoutsville station, Missouri, November 12th, 1890.

This agreement made between George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, parties of the first part, and M. B. Smizer, party of the second part, witnesseth that, whereas, the receivers of the Missouri, Kansas and Texas railway transport the live stock as per above rules and regulations, and which are hereby made a part of this contract, by mutual agreement between the parties hereto; now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the second party the live stock described below, and the parties in charge thereof as hereinafter provided, namely: Six cars said to contain 95 head of cattle m. or l. o. r. from Stoutsville station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union stock yards at Chicago, Illinois, at the through rate of 17½ c. per hundred pounds, from Stoutsville, Missouri, to Chicago, Illinois, subject to minimum weights applying to cars of various lengths as per tariff rules in effect on the day of shipment, the same being a special rate, lower than the regular rates, or at a rate mutually agreed upon between the parties, for and in consideration of which said second party hereby covenants and agrees as follows: * * *

13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the roads or road of any other railroad company, the said party of the first part shall be released from liability
91 of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas and Texas railway, excepting to protect the through rate of freight named herein."

Plaintiffs recovered judgment and defendants appeal.

The section of the statute involved in this litigation is the following:

SEC. 944. Whenever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained.

1. It has been ruled in Dimmitt *v.* Railroad, 103 Mo., 433, under the provisions of the quoted section (then section 598) that it was competent for a common carrier by specific agreement to agree to carry the property only to the terminus of its own line, or what is equivalent thereto by similar agreement to limit its liability to loss or damage occurring on its own line. This ruling was followed in Nines *v.* Railroad, 107 Mo., 475.

In an earlier case, Snider *v.* Express Co., 63 Mo., 376, before the enactment of the statute in question, a similar ruling was made.

In the case at bar the instrument which is the basis of this
92 action is to be considered as a whole. Construing it in this way, it is easy to see that the liability apparently assumed by the first clause of the contract is expressly qualified and limited by the 13th specific agreement aforesaid, which is clear and unambiguous terms confines the liability of the defendant company to its own line of road.

In consequence of this, and in consequence of the defendant company having promptly delivered at the terminus of its line the cattle to the connecting carrier, there was error committed by the trial court in refusing the third instruction asked by the defendant, to wit:

3. "The court instructs the jury that defendants are not liable, under the contract of shipment read in evidence, for any damages or delays occurring on any other railroad than the one operated by defendants, and if you find from the evidence that defendants transported plaintiffs' cattle from Stoutsvitle to Hannibal without unreasonable delay, and delivered said cattle to the Wabash Railway Company as the connecting carrier within the time usually and reasonable required for such transportation and delivery, then the defendants are not liable in this case, notwithstanding said cattle may have been unreasonably delayed on said Wabash railroad, and your finding should be for the defendants."

2. If the section under discussion is to be construed literally; if it is to be interpreted as casting on one railway company the bur-

den of the negligence of another railway company, against whose negligence the company sued has explicitly contracted, as in the present instance, then I have no hesitation in saying I do not believe that the legislature has the power thus to interfere with the right of a railway company to contract, speaking in a general way, as it may deem fit.

This power of individuals or corporations to contract as they think best has been recently decided by this court to be placed beyond legislative interference by constitutional guarantees, both State and Federal, which upheld the right of "due process of
93 law" and all that term implies. State *v.* Loomis, 115 Mo., 307. See also The Matter of Jacobs, 98 N. Y., 98; Butchers' Union cases, 111 U. S., 746; *In re* Sam. Kee, 31 Fed. Rep., 680.

The same ruling is applicable in this case; and it is equally beyond the power of the legislature, without fault on the part of the railway company complained of and in spite of a contract to that effect to the contrary, to cast upon such company the burden of paying for losses incurred through the negligence of another and distinct corporation.

Of course, as against its own negligence a corporation would not be allowed to contract; for this would be subversive of public policy, and, besides, would be an abdication of the duties and functions as common carrier, which, by the very terms of its charter, it would not be allowed to abdicate nor abrogate.

But contracting against the negligence of another corporation rests upon a different footing altogether.

3. Moreover, if section 944, *supra*, is to be construed as being operative beyond the boundaries of this State, then it is plainly a regulation of interstate commerce, and therefore violative of section 8 of article 1 of the Federal Constitution. Stanly *v.* Railroad, 109 Mo., 435.

Any rule pertaining to the transportation of passengers or merchandize from one State to another is a regulation of interstate commerce, and therefore, under the prohibitions of the Federal Constitution, a State is inhibited from making such regulations. Case of the State Freight Tax, 82 U. S., 232.

In order to conspicuously show that the statute construed as plaintiffs desire is plainly such a forbidden regulation, it is only necessary to suppose that the State of Illinois should enact laws in reference to merchandize transferred to that State from this State, and at variance with section 944 aforesaid. As is aptly elsewhere said, "Commerce cannot flourish in the midst of such embarrassments." Hall *v.* De Cuir, 95 U. S., 485. See also Gibbons *v.* Ogden, 9 Wheat., 1; Pickard *v.* Pullman, 117 U. S., 34; Hardy *v.* Railroad, 18 Am. & Eng. R. R. Cas., 432; Carton *v.* Railroad, 59 Iowa, 148; Louisville *v.* Com'rs, 16 Am. & Eng. R. R. Cas., 1.

94 For the foregoing reasons, as it is evident that plaintiffs have no standing in court, the judgment will be simply reversed.

All concur.

T. A. SHERWOOD.

And afterwards, to wit, on the 10th day of July, 1894, the further following proceedings were had in said cause, viz:

McCann & Smizer, Respondents,
vs.
Geo. A. Eddy *et al.*, Appellants.

Come now the said respondents, by attorney, and file their motion for a rehearing herein.

Which said motion for rehearing is in words and figures as follows, viz:

In the Supreme Court of Missouri, Division No. 2, April Term, 1894.

McCann & Smizer, Respondents,
vs.
Geo. A. Eddy and H. C. Cross, Receivers of the Missouri, Kansas & Texas Railway, Appellants. } No. 6391.

Motion for Rehearing.

Comes now McCann and Smizer, respondents in the above-entitled cause, and moves the court to grant them a rehearing therein for the following reasons:

I.

Because the court entirely overlooked and consequently misstated the ground upon which plaintiffs sought to recover in this action, and, though innocently, it yet erroneously places plaintiffs' counsel before the bench and bar of this State in the attitude of contending for a construction of law at variance with the Constitution of the United States and the State of Missouri and repugnant to reason and justice.

II.

Because the court wholly overlooked the principle of law announced by the plaintiffs and because the court considered
95 and decided the cause upon a theory not only not contended for by plaintiff-, but by plaintiff- specifically disowned in a separate point in *his* brief and farther emphatically disavowed in *his* written argument.

III.

Because the court overlooked the fact that when the receiving carrier entered into a written obligation of through carr-age it undertook, by voluntary contract, to carry beyond its own lines, and in pursuance of its said contract took exclusive possession, control, and management of said cattle to their entire destination, and contracted with and paid the Wabash and made all necessary arrangements with it to complete, for appellants, its contract of shipment, whereby appellant- made the Wabash Company as much *its* agent and servant from the place of the terminus of the line of the M., K.

& T. on to Chicago as *its* own employees were *its* agents from the place of plaintiffs' delivery of the cattle, at Stoutsville, on to the terminus of *its* own road; that by appellants agreeing to transport over the connecting carrier's line and obligating *itself* to carry beyond its terminus the law thereupon fixed upon *it* a liability for the negligence of *its* servants thus employed by *it* in such further transportation, and against which negligence they could not contract. In other words, appellants' liability for negligence against which *it* could not contract was coextensive with *its* duty to transport, whether such duty was imposed by law or assumed by contract; and therefore in just so far as *it* extended *its* obligation by a contract to carry, just so far the law divests them of the power to contract against the liability which they have by contract voluntar-ly assumed.

IV.

Because the court overlooked the fact that by reason of appellants employing *its* connecting carrier, the Wabash Co., as *its* agent to complete *its* contract of shipment that portion of the contract by which appellants sought to be "released from all liability after said live stock left *its* road" was thereby rendered void; for although the stock had left *its* road, it was delivered by *it* into the hands of *its* other servants, who were thereafter as much appellants' agents as were the employees of *its* own road. Should the court give vitality to this clause in the construction of the contract it is thereby permitted appellant- to contract against the negligence of *its* own chosen agent. It was affirmitively shown at the trial that *its* said agent, The Wabash Co., was guilty of the grossest negligence, whereby the damage and injury was caused to plaintiff-.

96

Because the court overlooked the fact that there was affirmative proof of total lack of consideration for said alleged release.

J. H. RODES,
Att'y for Respondents.

Application of Reasons for Reconsideration.

Such are the convictions of respondents' counsel that his duty to his clients, this court, or himself would be indifferently discharged, if not grossly neglected, did he not again respectfully though earnestly and importunately urge upon this court what he regards a necessity for further consideration of the law and the facts by which he so steadfastly believes this cause should be determined. Plaintiffs further ask from the court a most respectful consideration of this amplification, as it is made apparent from the first point brought to the court's attention in his motion that there is presented to the court what might be well termed a privileged question, and on presentation of the different grounds of the motion the same order will be followed as that in which they are presented therein. The court's attention is respectfully called to points I & II in said motion, which on account of their similarity will be jointly con-

sidered. In this point it is contended—and we think we can make it perfectly apparent—that the learned judge who wrote the opinion evidently misunderstood, wholly misconceived, and overlooked our contention of law, and has decided the case and written the opinion upon a view entirely foreign to the theory for which we so earnestly contended upon almost every page of our brief. This mis-
97 conception grew out of the apparent impression upon the part of the court that plaintiff- sought a recovery founded upon a right conferred upon them by section 944 of Revised Statutes 1889, while, indeed, such was the least of all plaintiffs' contentions, either before the trial or appellate court. The plaintiff- did not urge nor the trial court instruct the jury nor was the cause tried upon the theory that the statutes either conferred any right nor denied any remedy that plaintiff- did not have under *his* contract and would have had under it had the statute not been enacted.

This was appellants' contention: "That plaintiff- had no right except such as was conferred by said statute, and counsel made this point II in their brief, and they contend that the court ignored the construction of the statute given by the court in the Dimmitt case, and that such construction was in conflict with the State and Federal Constitution." Plaintiff-, to correct this misstatement of *his* contentions before the court, made a separate reply thereto on page 14 of *his* brief on file, which is as follows:

III.

"Appellants' 2nd point, made in their brief on file, has no application to the law under the plaintiffs' view of the case. The statute referred to has been construed to be no limitation upon the right to contract."

Citing Dimmitt *vs.* R. R., 103 Mo., 443.

Accepting thus and thereby the construction placed upon the statute in the Dimmitt case, and also elsewhere in *his* written argument commenting with approval thereon, and to further aid the court in understanding our position, the plaintiff- at the very outset ever prefaced *his* argument, "pg. 14 brief on file," with the following: "Since there seems to be such radical difference between the respondent-' and appellants' counsel, not only as to appellants' liability, but as to their ground of liability, the respondents have undertaken to faithfully set out in their statement of the facts all the material evidence upon which they base their right of recovery." Again on pg. 14, in 9th line of *his* argument, is the following: "It is therefore conceded that the right of the plaintiff- and the
98 liability of the defendant- must be determined upon a construction of said contract of shipment," set out on pages 30 to 37 of Abs. Indeed, nowhere in plaintiffs' statement of facts or in *his* brief or argument or elsewhere, either before *nisi prius* or appellate court, was any other theory or contention directly or indirectly urged, but, on — contrary, emphatically disavowed.

In fact, respondent-, so far as any contention to the contrary is disclosed, might well agree, as *he*, in fact, does agree, with all that

the learned judge has said in the opinion on file regarding the constitutionality of the statute quoted therein, if it were literally construed, both in relation to the State and Federal Constitution. The plaintiff- nowhere contended for such a construction; on the other hand, accepted and commented with approval upon the rule of construction adopted by the court in the Dimmitt case and cited said case alone under point III, and also cited the same case under point I as furnishing ample authority in support of his contentions. Again, beginning on the 12th line of the 18 pg. of our brief on file and continuing to the middle of the 20th pg. thereof, the plaintiff- expressed at length what *he* earnestly believes to be the true holding in the Dimmitt case, and *he* believes that there is perfect harmony between the views expressed in said opinion and the rule of law contended for in our construction of the case at bar.

It will be born- in mind by the court that this complaint of respondents' counsel is not made in the spirit of unfriendly criticism, for the well-known character of the author of this opinion would preclude any possibility of any intentional misrepresentation of the humblest contentions of the least worthy advocate of the forum.

That the court has so misconstrued plaintiffs' contentions, we beg to call the court's attention particularly *of* its language on the top of page 5 of the typewritten opinion of the court filed in this
99 case. This language, after a discussion of the statute regarding its scope, application, and constitutionality, is as follows: "In order to conspicuously show that statute, construed as plaintiffs desire, is plainly such a forbidden regulation, it is only necessary to suppose that the State of Illinois should enact laws in reference to merchandise transferred to that State from this State and at variance with section 944 aforesaid. As is aptly elsewhere said, 'Commerce cannot flourish in the midst of such embarrassments.'"

It has already been shown conclusively that plaintiffs neither desired nor contended for any such construction, and the honorable judge, upon being informed, will not uphold counsel before the bench and bar of this State as the advocate of such an untenable and unsound, if not senseless, contention.

We shall now ask the court's attention to the consideration of points III and IV, which on account of their similarity will be discussed together.

In doing so we will be as brief as we can consistent with the importance of the principle involved. We hope to make ourselves clearly understood, and when we succeed in doing so we feel assured that the court will fairly and unevasively decide our contention, and if, in the court's opinion, our position is tenable and just before the law, will magnanimously so decide. In discussing these points we shall aim to point out what we regard as an oversight of a principle of law upon the part of the learned judge in his construction of the contract. Before, however, doing so we wish to announce some of the principles of law and facts which govern the construction of this contract:

1st. That a carrier cannot in this State contract against his own negligence or the negligence of his agents. Halliday *v.* The St. L.,

K. C. & N. R'y Co., 74 Mo., 162; Baker *v.* R. R. Co., 34 Mo. App., 112; Railroad Co. *v.* McCarthy, 96 U. S., 266; 1 Wood R'y Law, sec. 190, pg. 545; Loomis *v.* W., St. L. & P. R'y Co., 17 Mo. App., 350; Grover & Baker Machine Co. *v.* Mo. P. R'y Co., 70 Mo., 674; Hutchinson on Carriers, 2nd ed., secs. 248, 257, and 263; Dimmitt *v.* R. R. Co., 103 Mo., 433; R. R. Co. *v.* Lockwood, 17 Wall., 357; Wharton on Neg., sec. 589.

100 2nd. That because of the existence of a written contract of shipment the statute referred to has no binding force or effect upon the appellant or its contract, and if bound at all it must be by virtue of its contract of through shipment.

Dimmitt *vs.* R. R., 103 Mo., 433.

3rd. That where negligence is permitted to be contracted against it must be clearly and unequivocally expressed. Where the terms employed are doubtful a stringent liability will determine the contract.

Hutchinson on Carriers, 2 ed., sec. 270.

4th. That appellants' undertaking was to transport the entire distance and to carry beyond the terminus of their line to point of destination.

5th. That the Wabash Co., though a connecting carrier, was employed and paid by appellant- to complete *its* contract of shipment entered into with plaintiff-.

6th. That it is proved affirmatively that the Wabash Co. was guilty of gross negligence which caused plaintiffs' damage.

7th. That it was clearly proven at the trial that no reduced rate lower than the regular rate was furnished plaintiff-, as alleged in the contract.

8th. That the carrier may in most cases, by special contract, for valid consideration, alter or modify its common-law liability almost *ad libitum*, but that such power is unalterably limited so as to prohibit it in most of the American States, especially Missouri, from contracting against liability for its negligence or the negligence of its agent. This rule and reason for the same is aptly stated in Lawson on Contracts, sec. 332 of edition 1893, as follows:

"In this contract it is held that he (the carrier) may limit his liability as an insurer by special contract, but he cannot by any contract exempt himself from responsibility for the consequence of his own negligence or the negligence of his servants or agents, contract of the latter kind being considered as void, because they are

101 against public policy and because they are supposed to be obtained under circumstances which give to the carrier an undue advantage in obtaining terms which the law cannot enforce without giving its sanction to injustice and oppression." Lawson on Contract, edition 1893, sec. 332; Lawson on Contracts of Carriers, pg. 46; Hutchenson on Carriers, 2nd ed., secs 248, 257, & 265; Halliday *v.* R. R. Co., 74 Mo., 162; Baker *vs.* R. R. Co., 34 Mo. App., 112.

Abundant evidence of the facts stated above and ample authority for the principles of law announced may be found in the abstract

of the record and in the brief of respondents' counsel, duly on file in court.

With permission of the court we shall now further announce what we discovered to be, as we think, the true rule of liability of the carrier for negligence in this State and the principle upon which the law of such liability is founded.

1st. His indefeasible liability for negligence is coextensive with his obligation to carry, whether such obligation to carry arises from law or contract. Now, if we follow this well-established principle of law, we think it will clear away difficulties and bring harmony where confusion will otherwise exist.

When we apply the doctrine to cases where the liability for negligence exists by law we find many adjudicated cases in this State. This applies to all cases where the carrier receives goods to be shipped over his own line. And why? And on what principle of law does the doctrine rest? Because it holds itself out as a public carrier over the distance traveled by your own road, and the law not only binds it to carry the goods of the public so far, but to do so without negligence. Here its duty to carry is one of law, and the liability for negligence is one of law, against which the carrier cannot relieve himself.

Now, it is well-established doctrine in this State that the carrier may limit its liability to negligence on its own road. Why? Because it is not bound in law to carry beyond its own road. But the law says, "You must watch for yourself. If you come in and bind yourself by contract to carry beyond your road, then the law
102 will follow you, like your shaddow, with the same indefeasible liability to so carry without negligence; and while you may limit your liability on the connecting carrier's road over which you agree to carry, you may do so to that extent only which you could limit your liability on your own road, for now you have assumed voluntarily the duty to carry. You cannot by any devise, directly or indirectly, in the same contract or any special contract, limit your liability against the negligence of the agent you employ in such further transportation, and your attempts to do so are void." This is the principle contended for, which we contend the learned judge overlooked in the construction of the contract; that he gave force and effect to the 13th clause, which was void; void because the carrier had voluntarily assumed the duty to carry beyond its own road, and which it was not bound in law to assume, but, when it was assumed, it was assumed *cum onere*. It could not reap the advantages without the disadvantages of a through contract.

When it assumed the obligation to carry *eo instanti* the law fixed its liability. As aptly expressed by Lawson on contracts:

"The law attaches his responsibility to his employment or calling, and, if he assumes the calling, he has no power over the duties which the law annexes to his calling. He, assuming the character of a common carrier, depends entirely on his own will and assent; but if he undertakes the occupation, the liabilities which come upon him in respect of goods brought or borne to him to be carried *and* imposed by law and not created by assent or agreement."

Now, applying this principle to cases cited by the learned judge as authority for his decision, we find that they were all cases where the carrier had not bound itself by contract to carry further than its own line, and hence might well by specific agreement only contract to carry property to the terminus of its own line, or, what is equivalent, enter into a special agreement that it will be liable only for loss or damage occurring on its own line, but the court
103 never meant to say that it could by contract assume the duty to carry beyond its own line and at the same time in the same or any other agreement say that it would be liable for nothing beyond its own road.

For, even if the court would uphold such cause, it would not so construe it as to release them from the negligence of such connecting carrier.

Hutchinson on Carriers, 2nd ed., secs. 261 & 264 & 270.

The doctrine of *contra preferentem* has a right application.

Now, the case of Snyder *vs.* Express Co., 63 Mo., 376, referred to by the court, was a case where the express Co. had not contracted for a through carr-age and, of course, might limit their liability to their own line, because they did not assume to carry beyond and the connecting carriers were not made their agents.

The same is said of the Dimmitt case and the Nines cases cited by the learned judge. In none of those cases had the carrier bound itself to carry beyond its own line, and for this reason might by specific contract limit their liability to their own road. Indeed, the court in the Dimmitt case says at the outset:

"At the time of the enactment (meaning the statute) the law was as well settled as now that a common carrier may *contract* (underscoring the word *contract*) to carry to a place beyond the terminus of its own road and thereby render himself as such liable for the whole distance."

What language could be plainer than this?

That is exactly what appellant has done in the case at bar. It has contracted to carry beyond its terminus and has thereby rendered itself liable for the whole distance.

There is a 5th point that might be pressed, but we sincerely hope that enough has been said to convince the honorable court that we are righteously contending for a principle clearly established in the basix law of this our jurisprudence, and that we have so addressed ourselves to the understanding of the court that our position
104 may be clearly seen and understood; but let us call attention to the only direct ruling on this point which we can find, which is in the case of Halliday *vs.* Railroad, 74 Mo., 162, which case arrose before the enactment of the statute, where the court says in unequivocal language, in a contract exactly like the one at bar, construing the effect of the identical clause, *says:*

"As the contract of the plaintiffs with the carrier was for the entire route, he could not stipulate for exemption for all liability beyond the terminus of his own line."

This case has never been overruled.

J. H. RODES,
Att'y for Respondents.

Geo. P. B. Jackson. Jno. Montgomery, Jr.

Jackson & Montgomery, lawyers.

SEDALIA, Mo., *July* 9, '94.

We hereby acknowledge notice of motion for rehearing in McCann & Smizer *v.* Receivers, in supreme court.

JACKSON & MONTGOMERY.

And afterwards, to wit, on the 15th day of October, 1894, the further following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Now, at this day, the court, having fully considered and understood the motion heretofore filed for rehearing herein, doth order that said motion be, and the same is hereby, denied.

And afterwards, to wit, on the 17th day of October, 1894, the further following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Come now the said parties, by attorneys, and suggest the
105 death of George A. Eddy and H. C. Cross, receivers, appellants herein; thereupon comes the Missouri, Kansas and Texas Railway Company and enters its voluntary appearance herein, and, upon motion and by consent of said parties, it is ordered by the court that this cause stand revived in the name of the Missouri, Kansas and Texas Railway Company, and, upon motion, the said respondents are granted 5 days in which to file a brief, and that the order overruling the motion for rehearing herein be hereby set aside.

Which said suggestion is in words and figures as follows, to wit:

In the Supreme Court of the State of Missouri, October Term, 1894.

McCANN & SMIZER, Plaintiff-,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway Company, Defendants.

It is hereby stipulated *that* the above-entitled cause as follows: Whereas both of the above-named defendants, Geo. A. Eddy and H. C. Cross, have departed this life since the last adjournment of the court; and

Whereas there is a question in regard to the proper practice in the matter of the revivor of this cause; and

Whereas the property heretofore in the hands of the said defendants, as receivers, has been turned over to the Missouri, Kansas & Texas Railway Company under orders of the proper courts appointing said receivers:

Now, therefore, upon the meeting of the supreme court of the State of Missouri, the deaths of said defendants shall be suggested to the court, and thereupon the said Missouri, Kansas and Texas Railway Company will offer to be made a party defendant in said cause, and all the delays and proceedings incident to an ordinary *scire facias* shall be waived, and the court may thereupon enter an order substituting the said Missouri, Kansas and Texas Railway Company as the party defendant in said cause, and that said cause
106 shall stand revived in the name of said Missouri, Kansas and Texas Railway Company as defendant, and all further proceedings in the said cause may be conducted by and in the name of the said Missouri, Kansas & Texas Railway Company as such defendant, and both parties hereby agree to adopt all pleadings and proceedings heretofore filed, taken, or had in said cause, and agree that whatever judgment may be entered by the supreme court of Missouri in said cause so revived, as aforesaid, shall have the same effect upon the parties to said revived cause as if they and each of them had been respectively plaintiff and defendant since the commencement of this suit, and if the judgment in said cause should be to any extent or any manner affirmed, then the same shall have the same force and effect against said Missouri, Kansas & Texas Railway Company as if the judgment had been originally entered against it in the circuit court; and if the said judgment shall be modified in any form or shall be reversed, then such modification or reversal shall inure to the benefit of the said Missouri, Kansas & Texas Railway Company in the same manner and to the same effect as though said railway company had all the time been the party defendant in this case; and all orders and judgments which may hereafter be made or entered in said cause in any court shall have the same effect in establishing any right in favor of the plaintiff, or in limiting the liability of the said defendants or of the said railway company, or in barring the right of action against them or any of them in the same manner and to the same effect that would have been the case if there had been no change of parties or if the said Missouri, Kansas & Texas Railway Company had all the time been the defendant in said cause.

In witness whereof the parties hereto affixed their names, by their proper attorneys, this 15th day of October, 1894.

McCANN & SMIZER,
Plaintiff- and Respondents,
By J. H. RODES, *Their Attorney.*
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
107 *Substituted Defendant and Appellant,*
By JACKSON & MONTGOMERY,
Its Attorneys.

And afterwards, to wit, on the 22nd day of December, 1894, the further following proceedings were had in said cause, viz:

McCann & Smizer, Respondents,
vs.
Geo. A. Eddy *et al.*, Appellants.

Now, at this day, the court, having fully considered and understood the motion heretofore filed for rehearing herein, doth order that said motion be, and the same is hereby, sustained, and that this cause be set for hearing January 19, 1894.

And afterwards, to wit, on the 19th day of January, 1895, the further following proceedings were had in said cause, viz:

McCann & Smizer, Respondents,
vs.
Geo. A. Eddy *et al.*, Appellants.

Come now the said parties, by attorneys, and after argument herein submit this cause to the court.

And afterwards, to wit, on the 12th day of July, 1895, the further following proceedings were had in said cause, viz:

McCann & Smizer, Respondents,
vs.
Geo. A. Eddy *et al.*, Appellants.

Now, at this day, it is ordered by the court that this cause be transferred to the court in banc.

And afterwards, to wit, on the 10th day of October, 1895, the further following proceedings were had in said cause, viz:

McCann & Smizer, Respondents,
vs.
Geo. A. Eddy *et al.*, Appellants.

Come now the said parties, by attorneys, and after argument herein submit this cause to the court.

And afterwards, to wit, on the 10th day of December, 1895, the further following proceedings were had in said cause, viz:

108 McCann & Smizer, Respondents,
vs.
Missouri, Kansas & Texas Railway Company, Appellant.
Appeal from Monroe County Circuit Court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court, have been now sufficiently advised of and concerning the premises, doth consider and adjudge

that the judgment aforesaid, in form aforesaid, by the said Monroe county circuit court rendered be in all things affirmed and stand in full force and effect, and that the said respondents recover against the said appellant their costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, in Banc, October Term, 1895.

McCann & Smizer, Respondents,
vs.
Eddy *et al.*, Appellants.

This action is to recover damages against defendants, as receivers of the M., K. & T. Railway Company, for negligent duty in the transportation and delivery of 95 head of cattle from Stoutsville, in Monroe county, in this State, to Chicago, in the State of Illinois.

Stoutsville is a station of the road operated by defendants. Hannibal is the eastern terminus of their road. From that point the Wabash R'y Co. operates a road to Chicago. The cattle were delivered by defendants to the Wabash Company in a reasonable time and in good order, by which they were carried to Chicago. The negligence complained of was committed on the Wabash road and by its employés.

So much of the contract under which the shipment was made as is necessary to an understanding of the questions involved is as follows:

109 Rules and regulations.—"In case the owner or consignor agrees to hold these receivers free from liability from any and all causes enumerated in the following contract; also agrees to load, feed, water, and attend to the stock himself, etc., as specified therein, the rates agreed upon and specified in the contract will be given."

Live-stock Contract; Executed at Stoutsville Station, Mo., Nov. 12, 1890.

"This agreement made between George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, parties of the first part, and M. B. Smizer, party of the second part, witnesseth that, whereas, the receivers of the Missouri, Kansas and Texas railway transport the live stock as per above rules and regulations, and which are hereby made a part of this contract, by mutual agreement between the parties hereto; now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the second party the live stock described below, and the parties in charge thereof as hereinafter provided, namely: Six cars said to contain 95 head of cattle m. or l. o. r. from Stoutsville station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union stock yards at Chicago, Illinois, at the through rate of 17½c. per hundred pounds, from Stoutsville, Missouri, to Chicago, Illinois, subject to minimum weights applying to cars of various lengths as per tariff

rules in effect on the day of shipment, the same being a special rate, lower than the regular rates, or at a rate mutually agreed upon between the parties, for and in consideration of which said second party hereby covenants and agrees as follows:

The first and thirteenth of these covenants are as follows:

1st. That he hereby releases the party of the first part from the liability of common carrier in the transporta'ion of said cattle and agrees that such liability shall be that of a mere forwarder or private carrier for hire. He also hereby agrees to waive, release and hereby does release said first party from any and all liability for and on account of any delay in shipping said stock, after
110 the delivery thereof to its agent, and from any delay in receiving same after being tendered to its agent.

13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the roads or road of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto — that the party of the first part shall not be held liable for anything beyond the line of the Missouri, Kansas & Texas railway, excepting to protect the through rate of freight named herein."

The contract was signed by both parties, and under it defendants claim exemption from liability.

Defendants asked, but the court refused to give this instruction:

"The court instructs the jury that under the contract read in evidence under which plaintiffs' cattle were shipped the defendants are not liable for any damages sustained by delays or otherwise after said cattle were delivered by defendants to the next connecting carrier."

The court, of its own motion, gave this instruction:

"If from the evidence the jury find that beyond the limit of a reasonable time for the delivery of plaintiffs' cattle at the Union stock yards at Chicago, Illinois, the Wabash Railway Company negligently delayed said delivery and thereby directly caused pecuniary damage to plaintiffs in the disposition of said cattle, the jury will find for plaintiff-, and in default of such finding the jury will find for defendant-."

The evidence tended to prove the negligence charged and the resulting damages.

The judgment was for plaintiffs, and defendants appealed.

I. This appeal involves the interpretation of the contract under which the cattle were shipped and a determination of the effect that should be given the clause exempting defendants from "all liability of every kind after the cattle left its road."
111 As the contract must be considered so as to give proper effect to the statute, the interpretation of section 944 in its application to the contract is also necessary.

That statute is as follows:

"Wherever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

This section was construed in the Dimmitt case (103 Mo., 440), and its application to the contract there in question was determined.

In that case it was held that the general effect of the statute and its evident purpose was to apply to common carriers the English rule of duty and liability in respect to the carriage of property beyond their own route, as distinguished from the American rule which was at the time recognized as the law in this State.

In that case the goods were consigned to a point beyond the route of the receiving carrier, and there was no express limitation by contract not to carry to their destination. The court held that under the statute the receiving carrier was liable for the loss of goods occurring through the negligence of the carrier to which it had delivered them for transportation to their destination.

This ruling was in accord with the decisions of the English
112 courts, but under the law as it existed in Missouri prior to the statute, upon the facts shown to have existed, the receiving company would not have been liable for the loss.

There is no doubt the statute by its very terms has the effect of applying the English rule so far as it makes the receiving carrier responsible for the defaults of other carriers through whose agencies it undertakes to complete the contract of carriage. This is as far as the decision in the Dimmitt case goes.

But the statute can only be held to adopt so much of the English rule as is consistent with it. It cannot properly be held to abrogate the existing law in this State unless inconsistent with it. The statute engrafted upon the law of this State as it then existed makes the rule by which we must be governed. The English law does not make it.

To the extent, then, that the statute declares the English rule, the decisions of the English courts would be authority for its interpretation, but they would not be authority where the statute and the rule conflict. The statute must be interpreted in the light of our own law, and, so far as possible, in conformity to it.

In the Dimmitt case, *supra*, the court says:

"By its provisions the act of acceptance by a common carrier of property to be transferred to a place beyond the terminus of its route is evidence of a contract to carry such property to the place of its destination. The act of issuing a receipt or bill of lading for property to be transferred to a place beyond the terminus of the route of a common carrier is evidence of a contract by such carrier to carry such property to the place of its destination. This *prima facie* case the statute makes for the plaintiff on the facts stated. In order to defeat it the defendant must show that by specific agreement it only contracted to carry the property to the terminus of its own line, or, what is equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line."

This is a fair statement of the interpretation given by the English courts to contracts for transportation beyond the route of the
113 receiving carrier. Hutchinson on Carriers, sec. 147; Lawson Cont. of Car., sec. 238.

The law as stated is also within the terms of the statute and is inconsistent with the law of this State as previously declared by this court. Coats *v.* Express Co., 45 Mo., 238; Snyder *v.* Express Co., 63 Mo., 376.

The provision of the statute is that "wherever property is received by a common carrier to be transferred from one place to another." This language does not restrict, but rather recognizes the right of the carrier to limit its contract of carriage to the end of its own route, and there deliver the property to the connecting carrier.

There can be no doubt, then, that under the statute, as well as under the English law, the carrier can, by contract, limit his duty and obligation to carriage over its own route.

But it seems that under the decisions of the English courts a carrier can also limit his liability to a loss of damages occurring on his own route by specific agreement that it should only be so liable.

In the Dimmitt case the rule is stated to its full extent, though unnecessary to the decision in that case, there having been no attempt to make such limitation.

While, under the decisions of this court, it has been held that a carrier could, by contract, limit its common-law liability of insurer, it was before the statute and has been since uniformly held that he could not, by contract or otherwise, relieve himself from liability for loss or damage occasioned by his own negligence or that of his agents or employés.

Such was the law when this statute was enacted. There is nothing in the statute that indicates an intention to change it. Indeed it seems to be recognized, for the statute by its terms only declares a liability for loss or damage caused by negligence.

The dictum of the court in the Dimmitt case, to the effect that an agreement that a carrier should only be liable for loss or damage occurring on its own line is equivalent to an express contract
114 to carry the property only to the terminus of its own line, cannot be taken as the law of this case, where there is an ex-

press contract and also an agreement for non-liability. Where the original undertaking is in doubt such an agreement might be evidence of the intention of the parties in respect thereto. This question is not involved here and need not be decided.

We cannot therefore give such an interpretation to the statute as would permit a carrier to contract for a through shipment, and at the same time exempt himself from liability on account of the negligence of connecting carriers. Such an interpretation would in effect operate as a repeal of the vital provisions of the law which declares a conclusive liability in such case.

The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but to extend it to connecting carriers as well, and declare a liability for negligence, without regard to which was in fault.

Under these views of the law no difficulty is found in giving construction to the contract. The agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt on the part of defendant to relieve itself from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. The statute forbids such qualification of the contract. It can only be held to relieve defendant from its common-law liability of an insurer.

The ruling of the court in respect to giving and refusing the instructions mentioned was correct.

II. We are unable to see, as contended by defendant, that the construction we gave this statute makes it repugnant to the provisions of the Constitution of the United States which gives to Congress alone the power to regulate commerce among the States.

The act in no way operates as a regulation of trade and business among the States. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation for their services for transportation between the States, subject to congressional regulations.

115 The statute merely prohibits a carrier who by contract undertakes to transport property to a point beyond its own route from relieving itself of responsibility for neglect to properly perform its duty. It only imposes the duty and liability which the law, from considerations of public policy, imposes upon all common carriers in the transportation of property over their own lines, though they may extend into other States.

A statute of Iowa which provided that no contract of a common carrier should exempt it from its common-law liability was held by the supreme court of that State not to be in conflict with the commercial power of Congress prescribed by the Constitution. Hart *v.* Railroad Co., 69 Iowa, 490; see also to the same effect Solon *v.* R'y Co., 63 N. W. (Iowa), 692, and Bogg *v.* R'y Co., 14 L. A. Reporters (N. C.), 596.

The judgment is affirmed.

All the judges concur except Sherwood, J., who dissents.

G. B. MACFARLANE.

And afterwards, to wit, on the 18th day of December, 1895, the following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
M., K. & T. R'Y Co., Appellant.

Come now the said appellants, by attorneys, and file their motion for rehearing herein.

In the Supreme Court of the State of Missouri, October Term, 1895. In Banc.

McCANN & SMIZER, Respondents,
vs.
EDDY & CROSS, Receivers, Appellants. } # 6391.

Motion for Rehearing.

Now comes the appellants in the above-entitled cause, The Missouri, Kansas & Texas Railway Company, in whose name the same has been revived as defendant and appellant, and moves the
116 court to grant a rehearing in this case for the following reasons:

Because the court overlooked and misconceived the true character, meaning, and effect of the contract sued on in this case and construed the contract to be an absolute and *unconstitutional* agreement to carry from Stoutsville, Missouri, to Chicago, Illinois, whereas the contract in its terms is expressly stated to be conditional, which point was expressly urged upon the attention of the court in the appellant's brief heretofore filed.

Because the court overlooked the real nature of the contract and of the controversy in this case and erroneously assumed that the release from liability was made by the contract to depend upon the rule and regulation printed at the head of the paper upon which the contract was written and also upon the stipulation in the contract for the special rate of freight and erroneously assumed that the appellants' contention was based upon such theory, whereas the correct reading of the contract shows that such was not the case, and whereas the appellant in its original brief expressly urged upon the court that such was not the case, and that it was not an attempt to secure release from liability upon any such consideration, and that the thirteenth paragraph of the contract, whereby the initial carrier was released from liability beyond its own line, was a part of the statement showing the extent and limit of the contract.

Because the court overlooked the question presented by appellant in its brief that the contract when properly construed was not one for through carriage, but simply one for the guaranty and protection of a through rate of freight named therein, it appearing from the opinion that the court wholly failed to consider or even notice that question or the fact that the contract recited that it was only made to protect a through rate of freight, although this proposition was urged upon the attention of the court in appellant's brief.

Because the court overlooked the fact that the contract which it now assumes to have been made was not made by the carrier
117 at all, but is wholly different from that which was clearly manifested by the intention of the carrier, and that the contract upon which the opinion of the court is based is one different in terms and substance from that entered into and signed by the parties, and that to permit the judgment and opinion to stand would be to substitute a contract wholly different from the one entered into by the parties.

Because the court has misconstrued the statute as it has heretofore been interpreted in this court in that by this opinion the statute is said to authorize a carrier to avoid liability beyond its own line only by limiting its contract of carriage to the end of its own route, in which event there could be no liability beyond its own line, because there would be no carriage beyond, so far as the contract is concerned; hence no necessity for the aid of any statute.

Because the court has misconstrued the nature and meaning of the case of Dimmitt *vs.* R'y, 103 Mo., 440, in attempting to make a part of that opinion mere obiter, whereas the part thus indirectly repudiated stands upon exactly the same footing as the part which it is attempted to sustain.

Because the court entirely overlooked and ignored a subsequent opinion of this court in division No. 2 in the case of Nines *vs.* R'y, 107 Mo., 475, in which the identical proposition presented in this case and contended for by the appellant was decided in favor of the appellant's contention and contrary to the result reached in this case.

Because under the various rulings and opinions of this court, including the opinion in the present case, the law as construed and declared by this court is wholly inconsistent and inharmonious, and a rehearing should be granted in this case in order that this case may be made to harmonize with the previous expressions of this court upon the same question, or, if the court had concluded that the former decisions were erroneous, that the same may be overruled and the statute allowed to stand with the force and effect
118 and subject to the same objections as to its validity which are sought to be avoided in the Dimmitt and Nines cases.

Because the court, in holding the act in question to be constitutional, wholly ignored the former opinion of division No. 2 in this case, as reported in the 27th Southwestern Reporter, 541, and also overlooked the previous decisions of this court in the case of Stanley *v.* R'y, 100 Mo., 435, and the case of Grimes *vs.* Eddy (division No. 2), 27th Southwestern Reporter, 479–483, and the same case in banc, 126 Mo., 168, which opinions counsel for appellants inadvertently omitted to cite.

GEO. P. B. JACKSON,
Attorney for Appellant.

And afterwards, to wit, on the 23rd day of December, 1895, the following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Now, at this day, the court, having fully considered and understood the motion heretofore filed for rehearing herein, doth order that said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 24th day of December, 1895, the following proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
GEO. A. EDDY *et al.*, Appellants.

Comes now the said appellant-, by attorney, and files *its* motion to vacate the order overruling the motion for a rehearing herein. Which said motion is in words and figures as follows, viz:

In the Supreme Court of Missouri, in Banc, October Term, 1895.

McCANN & SMIZER, Respondents,
vs.
EDDY & CROSS, Receivers, Appellants.

Motion to Set Aside Order Overruling Motion for Rehearing.

119 Now comes The Missouri, Kansas and Texas Railway Company, in whose name the above-entitled cause has been revived, as the defendant and appellant therein, and moves the court to set aside the order made on December 23rd, 1895, overruling the motion for rehearing heretofore files in this cause and to permit the appellant to file a brief herein, and to have said motion for rehearing submitted upon said brief in support of the same, for the following reasons:

Because the time for filing said motion for rehearing only expired on Thursday, December 19th, while the order overruling the same was made and entered on the morning of Monday, December 23rd, thus leaving only two working days after the expiration of the time for filing the motion until the same was disposed of.

Because the appellant, through its attorney, was preparing and having printed its brief and suggestions in support of the motion for rehearing, and was delayed in filing the same in court by reasons beyond its control.

That prior to the expiration of said Thursday, December 19, the said brief and suggestions were dictated and prepared for the printer, but the printing thereof was not completed on said December 19th; that the appellant's attorney was compelled to leave his office in St. Louis and go to Sedalia to attend business in the circuit court of Pettis county, and arranged to have the proof of said brief forwarded to him at that place; that on account of the recent floods and disarrangement of railroad traffic the said proof failed to arrive at

Sedalia at the time it was expected; that plaintiffs' attorney, completing his business there, returned to St. Louis and found that the proof had already gone to Sedalia, but had been delayed in reaching there, and before leaving Sedalia he left directions for the same to be returned to St. Louis, which was done, and said proof was received in St. Louis on Saturday, when it was read and returned to the printer, but not in time to have the said briefs completed so that they could be forwarded to be filed in the office of the clerk of this court before the court acted upon the motion on the morning of Monday, December 23rd; that had it not been for the un-
120 usual interruption in railroad traffic appellant would have been able to have had said brief printed in time to have forwarded same and had it filed on Saturday, and before the court would have acted upon the motion for rehearing; that the said brief was only finished by the printer on Monday, December 23, and the same is now forwarded to the clerk, together with this motion.

Because, as the appellant fully believes, the authorities cited by appellant in the said brief and the reasons deduced therefrom conclusively establish that the opinion and decision of this case as made by this court in banc is erroneous; that the same is in conflict with the former decisions of this court, as well as of the courts of many other States and of the appellate courts of the United States.

Because the appellant was entitled to be heard in support of its motion for rehearing and it was diligently preparing a brief to be submitted in support of the same, but was unavoidably and without fault on its part deprived of the privilege of filing such brief by the circumstances before mentioned.

Because the appellant when it submitted the case originally relied upon the cases cited in its first brief, viz, the case of Dimmitt *v.* Railway Company, and of Nines *v.* Railway Company, heretofore decided in this court—one case in division No. 1 and the other in division No. 2—as conclusively establishing the construction of section 944 of the Revised Statutes to the effect relied upon by appellant and conceded in the argument by council for respondent to have the same effect; and

Because in submitting the case to the court in banc counsel again relied upon said authorities, and upon the farther fact that division No. 2, by an unanimous opinion in this case, had ruled in the same way, and which was affirmed by the overruling of respondent's motion for rehearing and still no attack was made upon any of those decisions by the respondent; and

Because the position now taken by the court in regard to said statute was first taken and announced in the last opinion filed in this case.

121 Because, under the circumstances just mentioned, the appellant has never had an opportunity to argue the question now presented by the court in its last opinion; and

Because the argument submitted in the brief and suggestions in support of the motion for rehearing is the first presentation that

the appellant has been called upon or had the opportunity to make of its views and contentions upon the new question thus introduced into the case; and

Because the authorities cited and discussed in said last brief show that the conclusions reached in the last opinion in this case are not sustainable upon the rules governing cases of this kind.

Wherefore the appellant, respectfully suggesting to the court that it has committed error in rendering the decision which it has in this case, asks the court to examine the said brief tendered herewith, and, after considering the same, to grant the prayer of this motion, to wit, that the order overruling the motion for rehearing be set aside, and that the said motion be again submitted in connection with the appellant's brief and suggestions in support of the same.

GEO. P. B. JACKSON,
Attorney for Appellant.

And afterwards, to wit, on the 3rd day of March, 1896, the followings proceedings were had in said cause, viz:

McCANN & SMIZER, Respondents,
vs.
M., K. & T. R'Y Co., Appellant.

Now, at this day, the court, having fully considered and understood the motion heretofore filed to vacate the order overruling the motion for rehearing herein, doth order that said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 31st day of March, 1896, the following proceedings were had in said cause, viz:

122 McCANN & SMIZER, Respondents,
vs.
M., K. & T. R'Y Co., Appellant.

Now, at this day, there is presented to the Honorable Theo. Brace, in chambers, a writ of error to the Supreme Court of the United States, a citation directed to the said respondents, citing and admonishing them to be and appear at a Supreme Court of the United States on the 30th day of April, 1896, and a supersedeas bond in the sum of two thousand dollars; which said writ of error is allowed, said citation signed, and said bond approved and ordered to be filed and made a part of the record herein.

Which said bond is in words and figures as follows, viz:

Know all men by these presents that we, The Missouri, Kansas & Texas Railway Company, as principal, and —— ——, as sureties, are held and firmly bound unto McCann and Smizer, a copartnership composed of William C. McCann and Milton B. Smizer, in the full and just sum of two thousand and no 100 dollars, to be paid to the said The Missouri, Kansas and Texas Railway Company, its successors and assigns; to which payment, well and truly to be made,

we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at the October term, A. D. 1895, of the supreme court of Missouri, in a suit depending in said court between McCann and Smizer, copartners as aforesaid, respondents, and The Missouri, Kansas & Texas Railway Company, appellant, judgment was rendered against the said Missouri, Kansas & Texas Railway Company, and the said Missouri, Kansas & Texas Railway Company having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said McCann and Smizer, citing and admonishing them to be and appear at a Supreme Court of the United States, to be held at Washington, D. C., not exceeding thirty days from the date of said citation:

123 Now, the condition of the above obligation is such that if the said The Missouri, Kansas & Texas Railway Company shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

MISSOURI, KANSAS & TEXAS R'Y CO., [SEAL.]
By JAMES HAGERMAN, *Gen. Solicitor.* [SEAL.]
W. NICHOLS. [SEAL.]

Sealed and delivered in presence of—

GEO. P. B. JACKSON.

Approved by—

THEO. BRACE, *C. Justice.*

April 1st, 1896.

And afterwards, to wit, on the 14th day of April, 1896, the further following proceedings were had in said cause, viz:

McCann & Smizer, Respondents,
vs.
M., K. & T. R'y Co., Appellant.

Now, at this day, comes the said appellant, by attorney, and files its assignment of errors herein.

Which said assignment of errors is in words and figures as follows, to wit:

In the Supreme Court of the State of Missouri. In Vacation.

McCann & Smizer, Defendants in Error,
vs.
Missouri, Kansas & Texas Railway Company, Plaintiff in Error.

Assignment of Errors.

Now comes the above-named defendant (plaintiff in error) and for its assignment of errors says that in the record and proceedings in the above-entitled case there is manifest error, in this:

1. The supreme court of the State of Missouri erred in holding and deciding that sec. 944 of the Revised Statutes of the State of Missouri of 1889 is not repugnant to the Constitution of the United States.

2. The said sec. 944 of the Revised Statutes of the State of
124 Missouri of 1889 is repugnant to and in conflict with the Constitution of the United States for the reason that it attempts to and, if enforced according to its terms and purposes, does regulate commerce between the different States; and the supreme court of the State of Missouri erred in holding that under the effect of said statute the plaintiff in error was liable in this case for the negligence of another carrier in the State of Illinois upon a shipment from a point upon the road of the plaintiff in error in the State of Missouri to a point upon another line of railroad in the State of Illinois.

GEO. P. B. JACKSON,
Attorney for the Plaintiff in Error,
Missouri, Kansas & Texas Railway Company.

State of Missouri, *sct:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of all the record and proceeding- had and made by this court in the above-entitled cause as fully and complete as the same appears of record and on file in this office.

Seal of the Supreme Court of Missouri.

In testimony whereof I have hereunto set my hand, as such clerk, and affixed the seal of said court. Done, at office, in the city of Jefferson, this 16th day of April, A. D. 1896.

JNO. R. GREEN, *Clerk.*

Endorsed on cover: Case No. 16,267. Missouri supreme court. Term No., 161. The Missouri, Kansas and Texas Railway Company, plaintiff in error, *vs.* McCann & Smizer, a copartnership composed of William C. McCann & Milton B. Smizer. Filed April 27, 1896.